NO. 80-875

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GARY W., ET AL.,

Respondent

VERSUS

STATE OF LOUISIANA, ET AL.,

Petitioner

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, State of Louisiana, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit in the above entitled case.

QUESTIONS PRESENTED

1) Does the decision of *Hutto v. Finney*, 437 U. S. 678 (1978), allow the federal court to seize state funds in order to satisfy an award of attorneys' fees?

2) May a judgment creditor execute on a money judgment against a state under the provisions of the Federal Rules of Civil Procedure, Rule 70 for specific performance, instead of under the provisions of Rule 69 for executions on money judgments?

PARTIES TO PROCEEDING

Listed below are the original plaintiffs and defendants. Only the defendants whose names are in italics are the main parties at interest in the current appeal.

GARY W., by his guardian and next friend, W. M. and his mother D. S.; JOSEPH G., by his mother and next friend, J. B.; ELIZABETH M., by her mother and next friend, N. T.; DWANA MARIE M., by her grandmother and next friend, N. T.; on behalf of themselves and the class of all others similarly situated; W. M., guardian of GARY W.; D. S., mother of GARY W.; J. B., mother of JOSEPH G.; N. T., mother of ELIZABETH M. and grandmother of DWANA MARIE M.; on behalf of themselves and the class of all others similarly situated.

Plaintiffs,

STATE OF LOUISIANA in its capacity as guardian parens patriae of the above named and class of children; EDWIN EDWARDS, individually and as Governor of the State of Louisiana; LOUISIANA HEALTH AND SOCIAL AND REHABILITATION SERVICES ADMINISTRATION; DR. WILLIAM STEWART, individually and in his official capacity, LOUIS MICHOT, individually and in his official capacity; CHARLES MARY, JR., M. D., individually and in his official capacity; GARLAND I. BONIN, individually and in his official capacity; CHARLES YOST, individually and in his official capacity; DR. ANDREW HEGMEG, individually and in his official capacity; SIDNEY GOMEZ, individually and in his official capacity; OTTO P. ESTES, individually and in his official capacity; WILLIAM ADDISON, M. D., individually and

in his official capacity; GARY SNEED, M. D., individually and in his official capacity; ISRAEL SIDNEY, individually and in his official capacity; HOWARD K. SOMMERS, individually and in his official capacity; CATHERINE OBERHOLTZER, individually and in her official capacity; CASPER WEINBERGER, individually and in his official capacity;
FRANK GROSCHELLE, individually and in his official capacity; THE BROWN SCHOOL, INC.; CAL FARLEY'S BOYS RANCH, INC.; JONES CHILDREN'S HAVEN, INC.; CRIPPLED CHILDREN'S COTTAGE, INC.; EAST TEXAS GUIDANCE AND ACHIEVEMENT CENTER, INC.; MISSION ROAD FOUNDATION FOR EXCEPTIONAL CHILDREN, INC.; MARY LEE FOUNDATION, INC.; MARBRIDGE FOUNDATION FOR RETARDED CHILDREN, INC.; SHADY BROOK SCHOOLS CORPORATION, INC.; BEAUMONT REMEDIAL CLINIC, INC.; MERIDELL ACHIEVEMENT CENTER, INC.; SUMMIT OAKS ACHIEVEMENT CENTER, INC.; ABILENE YOUTH CENTER, INC.; BAGLEY HOME FOR EXCEPTIONAL CHILDREN, INC.; GREENHIGH RESIDENTIAL TREATMENT CENTER, INC.; HARRIS COUNTY HALFWAY HOUSE; HEART OF TEXAS CONVALESANT HOME, INC.; THOMAS W. HUGHEN SCHOOL, INC.; McDONALD DEVELOPMENTAL HOME, INC.; PEACEFUL VALLEY CHILDREN'S HOME, INC.; THOMAS HOSPITAL FOR EXCEPTIONAL CHILDREN, INC.; ROLLING CREEK MANOR, INC.; FRED DAY HOME FOR CHILDREN, INC.; WOODACRES CHILDREN'S HOME, INC.; DYER VOCATIONAL TRAINING CENTER, ROBERT DYER, GEORGIA DYER, MRS. JAMES H. LATHAM, GERTRUDE M. GOODMAN, TERRY P. AYRE, JOHN S. TEED, individually and as agents of the State of Louisiana and as owners and operators of the Dyer Vocational Training Center; JOHN DOE'S ONE

THROUGH ONE HUNDRED (whose true names are presently unknown) individually and as employees and agents of the United States Government, the State of Louisiana, or the above named commercial institutions for the confinement of children,

Defendants.

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OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals is reported at 622 F. 2d 804 and is reprinted in the Appendix hereto pp. A-23 *infra*. The opinion of the District Court for the Eastern District of Louisiana awarding attorneys' fees is reported at 429 F. Supp. 711 and is reprinted in the Appendix hereto pp. A-1 *infra*. The opinion of the District Court for the Eastern District of Louisiana denying petitioner's motion for relief under a Rule 60(b) motion is reported at 441 F. Supp. 1121 and is reprinted in the Appendix hereto pp. A-8 *infra*.

JURISDICTION

The judgment of the Court of Appeals was rendered on July 31, 1980. Jurisdiction of this Court is invoked pursuant to 28 U. S. C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Due to the large number of statutes involved in this litigation, they are merely listed here and are reprinted in the Appendix hereto pp. A-76 *infra*.

United States Constitution

U. S. CONST., Amend. 11
U. S. CONST., Amend. 10

Federal Statutes

42 U. S. C. Section 1988 (Supp. 1976)

Federal Rules of Civil Procedure

Fed. R. Civ. P. 69
Fed. R. Civ. P. 70

Louisiana Constitution
LA. Const., art. VII, sec. 10(a)
LA. CONST., art. XII, sec. 10(c)

STATEMENT OF THE CASE

This case originated as class action litigation concerning mentally retarded and/or emotionally disturbed children from Louisiana who were placed in Texas institutions by the Department of Health and Human Resources due to a lack of space in such Louisiana institutions. Jurisdiction of the district court was invoked under 5 U. S. C. Section 1321, 1332, 1343, 1361 and 28 U. S. C. Section 2201 *et seq.* (Supp. 1980). Before the 1977 legislative session began, a judgment in this case by the United States District Court for the Eastern District of Louisiana ordered the return of the Louisiana children from Texas to Louisiana at an untold cost to the state since there were no facilities available to house the children. In addition plaintiffs were held entitled to attorneys' fees under the Civil Rights Attorneys' Fees Act of 1976, 42 U. S. C. 1988 (Supp. 1976), formerly Chapter 114, Section 18, 16 Stat. 144 (1870). See *Gary W. v. State of Louisiana*, 429 F. Supp. 711 (E. D. La. 1977). 1/

During the same session the Louisiana Legislature was faced with an opinion by the United States Court of Appeals for the Fifth Circuit affirming an extensive lower court order to upgrade the state penitentiary. 2/ The state was ordered to implement reforms that would cost in excess of one hundred million dollars.

1/ Due to the procedural complexity of this case, we borrow heavily from the syllabus provided by the Fifth Circuit in this matter. See, *Gary W. v. State of Louisiana*, 622 F. 2d 804, 805 (5th Cir., 1980).

2/ *Williams v. McKeithen*, 547 F. 2d 1206 (5th Cir. 1978).

Judge Goldberg in his opinion for the Fifth Circuit, makes reference to two attempts by the Louisiana Legislature to pass an appropriation for the award of attorneys' fees in this case. *Gary W. v. State of Louisiana*, 622 F. 2d 804, 805 - 806 (5th Cir. 1980). It appears from a careful analysis that the same legislator introduced two bills to appropriate the funds during the 1977 session. He abandoned one and brought the other to the House floor for a vote, which was defeated by a vote of 47 to 48. 3/ While there is no recorded transcript of the debate of the Louisiana Legislature, it has been reported that the legislators were concerned with the award of $204,916.88 in the case at bar when compared to the potential attorneys' fees in the *Williams* case 4/ for the reform of the state penitentiary.

The Louisiana Constitution Article 7, Section 10 mandates the following:

> "Section 10. (A) Appropriations. Except as otherwise provided by this constitution, money shall be drawn from the state treasury only pursuant to an appropriation made in accordance with law."

while Article 12, Section 10(c) provides

> "The legislature shall provide a procedure for suits against the state, a state agency, or a political subdivision. It shall provide for the effect of a judgment, but no public property or public funds shall be subject to seizure. No judgment against the state,

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3/ See Official Journal of the Louisiana House of Representatives May 18, 1977 and August 11, 1977, Appendix pp. A-79.

4/ Award of $27,500.00 was made by the District Court after eleven years of litigation. *Williams v. McKeithen*, M. D. La., 71-98 (unreported minute entry) August 4, 1980.

> a state agency, or a political subdivision shall be exigible, payable, or paid except from funds appropriated therefore by the legislature or by the political subdivision against which judgment is rendered."

Without such an appropriation, no funds may be withdrawn by any state official to pay a judgment. Accordingly, the Attorney General was requested to ask the District Court to reconsider the award of attorneys' fees in this case.

The plaintiffs, incensed at the Legislature's refusal to appropriate the funds, immediately directed the clerk of the district court to issue a writ of seizure in the form of a ***fieri facias*** directing the U. S. Marshall to seize a bank account of Department of Health and Human Resources in order to satisfy the judgment. The State moved to quash the writ of ***fieri facias*** on the ground that the Louisiana Constitution prohibits the seizure of public property to satisfy a judgment against the state or a state agency.

Judge Alvin B. Rubin, Circuit Judge, sitting by designation on the Eastern District bench, struck down the State's contention that the pivotal issue of the parameters of the Court's discretion to award fees had never been properly briefed or argued. He further ruled that the federal court "need not face the difficult problems" 5/ of whether Louisiana law would control execution on a money judgment under rule 69, because rule 70 (specific performance) provided all the authority needed to execute on the judgment and was not controlled by state procedure and practice. In ***dicta*** he stated that 42 U. S. C. Section 1988 was a federal law under the terms of Rule 69 and would supercede state law. He ordered the state to place $225,000 in a bank account controlled by the Clerk of Court.

5/ *Gary W. v. State of Louisiana*, 441 F. Supp. 1121, 1125 (E. D. La. 1977)

The State took exception to such a ruling, and promptly appealed to the 5th Circuit. Judge Goldberg, writing for the Circuit, summarily affirmed Judge Rubin in a seven paragraph decision stating that

> "the previous ruling in *Gates v. Collier*, 616 F. 2d 1268 (5th Cir. 1980) controlled the issue allowing enforcement of attorneys' fees through Rule 70." 6/

Petitioners, seeking a more definitive consideration of the delicate and difficult issues of federalism involved, made timely application to this court for a writ of certiorari.

6/ *Gary W. v. State of Louisiana*, 622 F. 2d 804, 805 (5th Cir. 1980)

REASONS FOR GRANTING WRIT

The decision of the 5th Circuit in *Gary W. v. State of Louisiana*, 622 F. 2d 804 (5th Cir. 1980) is an unwarranted and significant extension of this Court's decision in *Hutto v. Finney*, 437 U. S. 678 (1978). It should be reversed.

In *Hutto*, a 5/4 majority held that the Civil Rights Attorney's Fees Award Act of 1976 in conjunction with the 14th Amendment authorizes the award of attorney's fees against the states *per se*.

Claims made by the State of Arkansas that the States were protected by the 11th Amendment were specifically rejected. The majority successfully argued that Congress had the power to defeat the States' 11th Amendment immunity from retroactive relief in order to enforce the 14th Amendment.

In addition, the opinion stated that the intent of Congress to award attorney's fees against the States was sufficiently evidenced by the legislative history and need not be expressed in clear statutory language, as costs, including attorneys fees, were traditionally taxed against the States without regard for their 11th Amendment immunity.

However, the dissenting justices, relying on *Edelman v. Jordan*, 415 U. S. 651 (1974) and *Fitzpatrick v. Bitzer*, 427 U. S. 445 (1976), maintained that "the threshold fact of congressional authorization to sue a class of defendants which *literally* includes States is wholly absent" *Hutto* at 705 (dissenting) (emphasis in original). Accordingly, they argued that clear statutory language was required in order to defeat the protection of the 11th Amendment, and denied that attorneys' fees should be awarded against the States.

Further, they warned that they did not view attorneys' fees

as having been traditionally awarded against the States as costs, and that such fees were not routine expenses comparable to a filing fee as alleged by the majority.

Rather, they emphasized that the "fees may involve substantial sums 7/" *Hutto* at 707 (dissenting) and could "place new or even enormous fiscal burdens on the States, . . . undermining the values of federalism served by the 11th Amendment" *Hutto* at 705 (dissenting).

Hutto, however, did not decide the issues clearly presented in *Gary W.* and its companion case *Gates v. Collier*, 616 F. 2d 1268 (5th Cir. 1980). In *Gary W.* the issue is not the federal courts' power to award attorneys' fees, but rather the advisibility of federal seizure of state funds when there is a conflict over the payment of an award of attorney's fees. *Hutto* did not reach this issue. It stopped short of the *Gary W.* problem saying only that the courts had the power to make such an award.

Assuming arguendo a concurrence with the majority view in *Hutto*, the power to award attorneys's fees does not include within its logical bounds the power to delve into the public fisc in the face of opposition to such an award. Such a seizure is an entirely different and more delicate issue. The principles of federalism demand that the States retain their essential governmental functions. The integrity of any state is compromised by the order of a federal court to disburse state funds in contravention of the State's own Constitution.

It is appropriate then that this court make a decision as to 1) whether the purpose sought to be achieved is important

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7/ Fees in this case to date including interest are well over $250,000.00.

enough to justify this significant and further intrusion into state sovereignty, i. e. an exercise by the courts of the legislative functions and 2) if the intrusion is justified is there sufficient Congressional authorization in the statutes as written, i. e. would specific statutory language be needed to authorize such a seizure?

These decisions were not made in *Hutto*, and it is not appropriate for the 5th Circuit to assume them from the language of *Hutto*.

On the contrary this is a case of first impression and should be decided by this Court. Although in 1917 the case of ***Virginia v. West Virginia***, 246 U. S. 884, addressed the issue of the right of the federal courts to enforce a monetary judgment, the case is clearly distinguishable.

That case dealt with a controversy over a contract between two states. The court derived its authority to enforce the monetary judgment by mandamus of the legislature, by levy of taxes, or by any other means from the original jurisdiction given to the court over controversies between states. It discussed at length the reasons for such an extraordinary waiver of the separation of powers including the fact that there might be no other way to resolve a controversy between states short of war.

However, even after noting that they had the power to enforce the judgment by whatever means necessary, the court chose not to exercise that power and returned the case to the docket for further argument so that they might be "spared in the future the necessity of exerting compulsory power against one of the states of the Union" ***Ibid.*** at 892.

It is urged that such should be the stance of this Court. As the court realized in ***Virginia v. West Virginia***, an imposition upon the theories of federalism and separation of powers is so

grave a constitutional conflict that it should only be undertaken when there is *no* other alternative. In the instant case there are several other solutions, most notably specific remedial legislation by Congress to correct this problem. The State of Louisiana contends that Congress never envisioned such a conflict and they certainly never envisioned that the federal courts would seize huge amounts of taxpayers' money as a result of that conflict. The State certainly does not wish to pass before this court an interminable parade of horribles which may emanate from a decision allowing the federal courts to supplant the state legislatures. Suffice it to say that a ruling allowing federal court interference in state fiscal matters would be the beginning of the end of the principles of federalism and separation of powers as we know them today.

This Court has counseled such restraint by the federal courts previously. In ***Metcalf and Eddy v. Mitchell,*** 269 U. S. 514, 523 (1926), you said that there is an

> ". . . essential requirement of our constitutional system that the Federal government must exercise its authority within the territorial limits of the states; and it rests on the conviction that each government in order that it may administer its affairs within its own, sphere, must be left free from undue interference by the other."

And as recently as 1976 in the *National League of Cities* case this theory was reaffirmed.

> "We have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the constitution prohibits it from exercising the authority in that manner." *National League of Cities v. Usery,* 426 U. S.

833, 845 (1976).

Judge Lumbard, writing for the 2nd Circuit this past summer also recognized the necessity of restraint in enforcing monetary judgments against states. In ***New York State Association for Retarded Children v. Carey***, _____, F. 2d _____, Nos. 1215, 1235 (2nd Cir. June 4, 1980) 8/ the State of New York signed a consent decree wherein Governor Carey agreed to make his best effort to secure funds for specified programs for the retarded.

When the legislature refused to appropriate the money, plaintiffs moved to have the Governor held in contempt unless he paid the funds in contavention of the direct orders of the legislature. The district court granted plaintiff's demands, but on appeal the 2nd Circuit reversed, writing in part:

> "The cases appellees cite did not, however, involve the remedy ordered in this case: that a state official expend state funds for a purpose expressly disallowed by the state legislature. ***We have previously held, and repeat here, that a federal district court ought not to put itself in the difficult position of trying to enforce a direct order . . . to raise and allocate large sums of money, . . . steps traditionally left to appropriate executive and legislative bodies responsible to the voters.***" *Carey, supra.*, _____ . (emphasis added).

Now only have the Eastern District of Louisiana and the 5th Circuit failed to exercise the restraint that should be shown in federal/state relations, but they have fashioned a new remedy. A very strained and incorrect reading of Federal Rules of Civil Procedure 69 and 70 is necessary in order to effectuate the

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8/ **Reprinted in this Appendix at A-62.**

result that they desire, namely collection of a money judgment under the provisions of Rule 70 for specific performance.

Rule 69 was intended to control the execution of money judgments and is governed by state practice and procedure. Under the applicable Louisiana procedure, the plaintiffs were unable to execute on their judgment. Judge Rubin, sitting by designation on the Eastern District Bench, called it an "intellectually wrong conclusion" that state procedure could operate to extinguish the right to execution. Accordingly, he twisted the language of 69 and 70 to allow execution on a money judgment under 70.

But other courts have not seen the issue in that light. The Ninth Circuit in *Hamilton v. MacDonald*, 503 F. 2d 1138 (9th Cir. 1974) recognized that such a result could obtain and was correct.

> It is, of course, somewhat anomalous that the Federal Rules of Civil Procedure, which purport to abolish the distinction between suits at law and equity (F. R. Civ. P. 2), operate to adopt a state statute extinguishing the right to execution on a judgment at law for money, but not in the case of an essentially equitable decree. The distinction traces to the sources of present Rules 69 (a) and 70. . . . thus, through the combined effect of Equity rule 8 and R. S. Subsection 916, process to execute an equitable decree solely for the payment of money was like that to execute a judgment at law, according to state pratice. *Ibid.*, 1148.

It is further submitted that if rule 69 were not to apply to the execution of ***all*** money judgments, that there would have been an exception clearly provided within the terms of Rule 69.

Nevertheless, both the trial court and the appeal court

relying on the logic of the companion case *Gates v. Collier*, extrapolated *Hutto* to an end certainly not intended by Congress or this Court. *Gates* uses a series of glib statements to construct an argument that supports the use of Rule 70 for execution of a money judgment. The argument, however, never deals successfully with the problems of federalism and separation of powers. It merely glosses over the confrontation.

The primary fallacy in the *Gates* argument is the assumption that the power to award attorneys' fees granted by this Court in *Hutto* and the power to seize funds out of a state treasury are the same. They are not. The latter implies a much greater intrusion into state affairs and the functions of the legislature. A series of easily rebuttabal arguments buttress the assumption.

Gates postulates that neither *Hutto* nor the legislative history of the Act "address the question of how to make an unwilling state or its officials satisfy a judgment for attorney's fees." *Gates* at 1271. However, the question could just as easily be stated as how to make a state or its officials who are protected by state procedure pay.

Gates correctly proceeds to the proposition that Congress did not deal with this problem because they assumed enforcability would be governed by the Federal Rules of Civil Procedure.

But *Gates* then alleges that Rule 70 comes in to reinforce rule 69, when enforcement is not available under Rule 69 due to state procedure. *Gates* provides no authority for such a statement, and ignores the fact, as treated earlier in this discussion, that sometimes judgments simply are not enforcable. See *Hamilton v. MacDonald*, 503 F. 2d 1138 (9th Cir. 1974); *South Dakota v. North Carolina*, 192 U. S. 448 (1903); *Nixon v. Sirica*, 487 F. 2d 700 (D. C. Cir. 1973).

Further, *Gates* uses quotations from *Hutto* out of context

as the basis for statements of law that have no support. For instance,

> "a federal court's interest in orderly, expeditions proceedings *Hutto v. Finney*, 437 U. S. at 696, justifies any reasonable action taken by the court to secure compliance with its orders." *Gates* at 1271.

This is true, but only within a certain context, that context being that reasonable action by the court must be made within the framework of the rules of procedure. *Gates* perverts the meaning intended by saying that it may twist the rules of civil procedure to arrive at a result it considers to be reasonable and equitable.

Gates concludes its argument by citing Judge Rubin's opinion on the case at bar while sitting on the Eastern District Bench:

> "The issue here is not one of judicial confrontation with the state. It is one of implementation of a Congressional mandate.' *Id.* at 1125 (emphasis added)." *Gates* at 1272.

Both Judge Rubin and the 5th Circuit have simply missed the point. This is not an either/or situation. It is not judicial confrontation with the state *or* implementation of a Congressional mandate. It is implementation of a Congressional mandate within the context of a judicial confrontation with the state. In other words, the mandates of Congress as interpreted by *Hutto* should be carried out, but this court and the Congress must find a way to do so without infringing upon the principles of federalism and separation of powers thought by the Founding Fathers to be necessary to the survivial of this nation as created.

CONCLUSION

Gary W. is a case of first impression and should be decided by this court. *Hutto* did not decide this case. The 5th Circuit's assumption that it did is an unwarranted and significant extension of *Hutto*.

Some lawyers have made the comment that they regard the *Hutto* decision as an invitation to raid State treasuries. Is that really what this Court meant by that decision? Evidently the district and appellate courts thought so.

When the Department of Health and Human Resources of the State of Louisiana is ordered to place $225,000.00 in a bank account controlled by the federal court in direct contravention of Louisiana law and the Federal Rules of Civil Procedure, matters have come to a grave pass.

Congress never contemplated this federal/state confrontation. This Court has counseled restraint in order to avoid this type of confrontation. The 2nd Circuit in *Carey* went out of its way to avoid just such a confrontation. Only the erroneous, strained reading placed on rules 69 and 70 by the district court and the 5th Circuit permitted the development of this confrontation.

Unless this court steps in to bring order out of increasing chaos the result may be catastrophic to federalism as we have come to know it.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Undersigned counsel for Petitioner certifies that service of this Petition for Writ of Certiorari has been made upon counsel for respondents this date, in accordance with law, by depositing three copies thereof in the United States Mail, postage prepaid, to the following persons:

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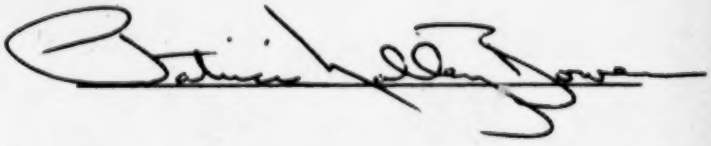

GARY W. et al.,
v.
STATE OF LOUISIANA et al.

Civ. A No. 74-2412

United States District Court,
E. D. Louisiana

Feb. 3, 1977.

ALVIN B. RUBIN, District Judge.

The award of attorneys fees to the plaintiffs in this case is authorized by recent congressional legislation, The Civil Rights Attorneys Fees Award Act of 1976, P. L. 94-559, and they will be granted in the amount stipulated by the parties. 1/ This decision has been reached after full consideration of a number of issues.

I. THE ELEVENTH AMENDMENT AND P. L. 94-559.

[1, 2] The Eleventh Amendment forbids a decree that would compel a state to pay damages to a private party. *Edelman v. Jordan*, 415 U. S. 651, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974) 2/ But the Fourteenth Amendment succeeded the

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1/ Statement of Understanding and Joint Stipulation, filed December 27, 1976.

2/ Though this suit is brought against individuals, not against the state per se, it is, in effect "seeking to impose a liability which must be paid from public funds in the state treasury . . . ." *Edelman*, 415 U. S. at 663, 94 S. Ct. at 1356. The individuals are being sued in their official capacities and not merely as private citizens.

> [W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants.

Ford Motor Co. v. Department of Treasury, 323 U. S. 459, at 464, 65 S. Ct. 347, at 350, 89 L. Ed. 389 (1945).

Eleventh and Section 5 of the Fourteenth Amendment gave Congress the power to enforce the Fourteenth Amendment "by appropriate legislation." Therefore, the Supreme Court held in *Fitzpatrick v. Bitzer*, 1976, 427 U. S. 445, 96 S. Ct. 2666, 49 L. Ed. 2d 614, that Congress may enact legislation permitting damage recoveries against the states when such legislation is necessary to enforce the Fourteenth Amendment. Congress may deem that effectuation of the purposes of the Amendment requires that a state defendant may be held not only for actual damages in the traditional sense but also for the attorney's fees that are necessary in some instances to implement fully a Civil Rights action. In *Bitzer*, which involved the award of attorney's fees under Title VII of the Civil Rights Act, the Court recognized that a line of cases defining the parameters of Sec. five,

> As sanctioned intrusions by Congress, acting under the Civil War Amendments, into the judicial, executive, and legislative spheres of autonomy previously reserved to the States. The legislation considered in each case was grounded on the expansion of Congress' powers - with the corresponding diminution of state sovereignty-found to be intended by the Framers and made part of the Constitution . . . .

96 S. Ct. at 2671. Thus, ". . . the Eleventh Amendment, and the principle of state sovereignty which it embodies . . . are necessarily limited by the enforcement provisions of Sec. 5 of the Fourteenth Amendment." *Id.*

Congress, in enacting P. L. 94-599, considered 42 U. S. C. sec. 1983 as part of the enforcement mechanism of the Fourteenth Amendment 3/ The report of the House Judiciary

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3/ Accord, *Wade v. Mississippi Cooperative Extension Service*, U. S. D. C. N. Miss., 424 F. Supp. 1242, 1976.

Committee states: "Of course, the 11th Amendment is not a bar to the awarding of counsel fees against state governments. ***Fitzpatrick v. Bitzer*** (citation omitted)". H. R. Rep. No. 94-1558, 94th Cong., 2d Sess. p. 7. Congressman Drinan, the author of the bill, said on the House floor shortly before passage of the bill:

"The question has been raised whether allowing fees against State governments in suits properly brought under the covered statutes would violate the 11th Amendment. That Amendment limits the power of the Federal courts to entertain actions against a state. This issue is no longer seriously in dispute after the recent Supreme Court decision in ***Fitzpatrick against Bitzer.*** Since this bill is enacted pursuant to the power of Congress under section 2 of the 13th Amendment and section 5 of the 14th Amendment, any question arising under the 11th Amendment is resolved in favor of awarding fees against State defendants. 122 Cong. Rec. 12160 (daily ed. Oct. 1, 1976)."

It is true that part of the legal work of plaintiffs' counsel was devoted to the claim on behalf of ECA children, which this court resolved on statutory rather than constitutional issues. See, the Social Security Act, 42 U. S. C. §608(f) (1).

[3, 4] But §1983 was enacted to protect citizens federal rights, whether statutorily or constitutionally defined from infringement by state officials. 4/ The plaintiffs' federal

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4/ ***City of Greenwood Mississippi v. Peacock***, 1966, 384 U. S. 808, 86 S. Ct. 1800, 16 L. Ed. 2d 944; ***Gomez v. Florida State Employment Service***, 5 Cir. 1969, 417 F. 2d 569.

statutory cause of action in *Gary W.* was brought as a §1983 claim not on the basis of general federal question jurisdiction. The essence of the plaintiffs' claims was that their *federal* rights had been violated by state officials acting under color of state law. Thus, their claims are part of the §1983 mechanism designed to enforce the Fourteenth Amendment.

Moreover, it appears that Congress contemplated enforcement of the policies of the Fourteenth Amendment via P. L. 94-599 with regard to federal statutory rights, 5/ Thus, there is no reason to distinguish between compensation for legal work accomplished on behalf of the ECA children and work accomplished on behalf of the DFS children.

II. APPLICATION OF P. L. 94-599 to "PENDING CASES".

[5] P. L. 94-599 expressly applies to "pending cases". 6/ The defendants do not dispute that this case is still "pending"

5/ Congressman Drinan stated:

> [S]ection 1983 authorizes suits against State and local officials *based upon Federal statutory* as well as constitutional rights. For example, *Blue against Craig*, 505 F. 2d 830, 4th Cir. 1974.

122 Cong. Rec. 12159 (daily ed. Oct. 1, 1976) (emphasis added). Senator Kennedy in referring to the types of cases covered by the new Act discussed, *inter alia*, a Social Security Act case and stated:

> in each of these cases, the victim . . . had to go to court to enforce the rights promised *by Congress* or the Constitution. *Id.* at 17052 (emphasis added).

6/ The House Judiciary Committee Report states:

> In accordance with applicable decisions of the Supreme Court, the bill is intended to apply to all cases pending on the date of enactment as well as all future cases. *Bradley v. Richmond School Board* H. R. Report No. 94-1558, 94th Cong., 2d Sess. p. 4 n. 6.

even though an opinion and order have been filed. (Def.'s brief, p. 2). The question is whether an award can be made only for those services rendered after the effective date of the enactment. In ***Bradley v. Richmond School District***, 1974, 416 U. S. 696, 94 S. Ct. 2006, 40 L. Ed. 2d 476, the court held that attorneys' fees might be awarded even though the statute authorizing recovery of attorneys fees, §718 of the Emergency School Aid Act, was enacted after the date of judgment and during the appellate deliberations of the case.

The court in ***Bradley*** mentioned concern over "the impact of [a] change in law upon existing rights, or, to state it another way, . . . the possibility that new and unanticipated obligations may be imposed upon a party without notice or an opportunity to be heard," 416 U. S. at 720, 94 S. Ct. at 2020-2021. See ***Thorpe v. Housing Authority of City of Durham***, 1969, 393 U. S. 268, 89 S. Ct. 518, 21 L. Ed. 2d 474. But it found that the defendant had always been subject to the possibility of a fees award based on a private attorney general theory or a finding of bad faith. Nor were new obligations imposed by the award:

"Even assuming a degree of uncertainty in the law at that time regarding the Board's constitutional obligations, there is no indication that the obligation under §718, if known, rather than simply the common law availability of an award would have caused the Board to order its conduct so as to render this litigation unnecessary and thereby preclude the incurring of such costs."

416 U. S. at 722, 94 S. Ct. at 2021.

The same considerations apply here. Notwithstanding some uncertainty in the law on the right to treatment issue, there has been no showing that the attorneys' fees statute would have prompted different behavior by the defendants. It imposed

no new legal obligation. 7/ This does not mean that a case might not exist where retroactive application of an attorneys' fees statute would impose a truly unforeseeable burden; this, however, is not such a case.

Bradley has been interpreted to justify an award of attorneys' fees for previously rendered services by the 5th Circuit in *Thompson v. Madison County Board of Education*, 1974, 496 F. 2d 782, at 690. See *Campbell v. Gadsen County District School Board*, 5th Cir. 1976, 534 F. 2d 650, at 568.

Beyond the *Badley* precedent for awarding statutorily authorized attorneys' fees for work accomplished prior to the effective date of the enactment, the legislative history of P. L. 94-599 supports the plaintiffs' construction of the statute. Congressman Drinan, sponsor of P. L. 94-599 stated

> . . . this bill would apply to cases pending on the date of enactment. It is the settled rule that a change in statutory law is to be applied to cases in litigation. In *Bradley versus Richmond School Board*, the Supreme Court expressly applied that long-standing rule to an Attorney fee provision, *including the award of fees for services rendered prior to the effective date of the statute. Id.* at 12160. (emphasis added).

III. APPORTIONMENT OF "PREVAILING PARTY" BASIS.

It is presumed that the stipulation of counsel for plaintiffs

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7/ See *Ferguson v. Winn Parish Police Jury*, 5 Cir. 1976, 528 F. 2d 592, n. 13 where the court awarded attorneys' fees in a Voting Rights Act suit challenging the apportionment of the police jury and the use of multi-member districts, a poorly marked legal territory in which the defendants might well have been unable to foresee the court's decision.

and counsel for state-defendants obviates the need for apportionment of fees. The stipulation indicates the number of hours for which the plaintiffs are to be remunerated, and was entered into after the defendants briefed the "prevailing party" issue.

In any event, approtionment of the fees to each discrete issue in this complex litigation would be virtually impossible. Many issues were resovled between the parties by agreement after protracted discussion. The court therefore awards attorneys' fees consistent with the stipulation of the parties. If the state defendants still pursue their argument and can suggest a feasible method to the court for apportionment, together with legal authority that apportionment is warranted, they may apply for reconsideration.

GARY W. et al.

v.

STATE OF LOUISIANA et al.

Civ. A. No. 74-2412

United States District Court

E. D. Louisiana

Oct. 25, 1977

As Amended Oct. 31, 1977

ALVIN B. RUBIN, * Circuit Judge:

The plaintiffs, who have obtained a final judgment for their attorneys' fees against the State of Louisiana, now seek to execute on that judgment. The state filed no appeal from the judgment, and concedes that it is final, but urges that the judgment is in effect uncollectible until the state chooses to pay it. Because the statute of the Congress that controls this action, adopted conformably to the Constitution, is the supreme law of the land, it is the duty of this court to enforce that law and to order the judgment satisfied.

I

On February 3, 1977, following extensive briefing and oral argument, this court ruled that the plaintiffs are entitled to attorneys' fees under the Civil Rights Attorneys' Fees Act of 1976, 90 Stat. 2641, 42 U. S. C. A. § 1988. *Gary W., v. State of Louisiana,* E. D. La. 1977, 429 F. Supp. 711. On March 15, 1977, a judgment against the state defendants was entered

*Sitting as District Judge by designation of Chief Judge John R. Brown.

in accordance with that opinion. Paragraphs 4 through 6 1/ of that judgment ordered the Louisiana Department of Health and Human Resources (DHHR) to pay the plaintiffs' court costs and reasonable attorneys' fees.

The state defendants did not appeal the court's judgment. The time for appeal has long since passed. However, despite the plaintiffs' demands for payment, the state defendants have not complied with the judgment entered against them. The Louisiana State Legislature voted this summer not to appropriate funds sufficient to pay the plaintiffs' court costs and attorneys' fees as this court ordered over six months ago.

The state defendants now seek relief from the March 15 judgment, while the plaintiffs seek to enforce it.

II

[1] The state defendants seek relief from judgment under Rule 60(b) (1), Fed. R. Civ. Proc., which permits a court to relieve a party of a final judgment against it on grounds of "mistake, inadvertence, surprise, or excusable neglect." The state takes the position that the court mistakenly, inadvertently, or by excusable neglect failed to consider the discretionary nature of attorneys' fees awarded under 42 U. S. C. A. §1988.

1/ **Paragraphs 4 through 6 read as follows:**

4. The Department of Health and Human Resources shall pay the Children's Defense Fund of the Washington Research Project $174, 519.88 for attorneys' fees and litigation expenses incurred through December 22, 1976, together with interest at the legal rate from date of Judgment.

5. The Department of Health and Human Resources shall pay William Rittenberg $30,397 for attorney's fees incurred through December 22, 1976, together with interest at the legal rate from date of Judgment.

6. The Department of Health and Human Resources shall pay the court costs of plaintiffs and plaintiff-intervenor as taxed by the clerk of the court.

When the issue was first presented in this court, the state did not offer in evidence any facts that would justify the denial of attorneys' fees to the plaintiff. It filed a brief contending that attorneys' fees should not be granted because the state defendants were not in bad faith. This had been the principle applied in ***Alyeska Pipeline Service Company v. The Wilderness Society***, 1975, 421 U. S. 240, 95 S. Ct. 1612, 44 L. Ed. 2d 141, but the ***Alyeska*** rule was changed by Congress when it enacted Public Law 94-559, amending 42 U. S. C. A. §1988. The only other defenses asserted were the applicability of the Eleventh Amendment, the inapplicability of Public Law 94-559 because it was enacted after this suit was filed, and the claim that the attorneys' fees should be mitigated because the plaintiffs did not succeed in proving every issue they had raised initially. Those defenses were likewise discussed in the prior opinion. The state never contended, nor did it ever offer any evidence to show, that the court should, in the light of the principles embodied in Public Law 94-559, refuse to allow attorneys' fees. While the state now contends that the award of attorneys' fees was erroneous under the terms of that statute, it offers no evidence to support that conclusion.

The Fifth Circuit has recently announced the standard to guide discretion in awarding attorneys' fees under 42 U. S. C. A. § 1988. In ***Brown v. Culpepper***, 5th Cir. 1977, 559 F. 2d 274, the court said that a plaintiff in such an action, if successful, "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." ***Brown, supra***, 559 F. 2d at 277. This was the rule adopted by the Supreme Court with respect to Title II of the Civil Rights Act of 1964, 78 Stat. 244, 42 U. S. C. A. §2000a-3, in ***Newman v. Piggie Park Enterprises***, 1968, 390 U. S. 400, 402, 88 S. Ct. 964, 19 L. Ed. 2d 1263.

The state defendants have offered no evidence of special

circumstances that would render the March 15 judgment unjust. *Cf. Northcross v. Board of Ed. of the Memphis City Schools*, 412 U. S. 427, 428, 93 S. Ct. 2201, 37 L. Ed. 2d 48 (1973). The award was not predicated on a finding of bad faith. It was based on the thesis, since adopted in *Brown*, that Congress intended an award to be made unless there were special circumstances making the award unjust. Therefore, the defendants' motion for relief from judgment must be denied.

III

The next group of issues deals with the alleged procedural barriers to enforcement of the order. Faced with the state defendants' refusal to comply with the court's March 15 judgment, the plaintiffs have caused a writ of fieri facias to be issued to the United States Marshal for the Eastern District of Louisiana commanding him to seize the:

". . . rights and credits of the Louisiana Department of Health and Human Resources, particularly funds under the control of said Department deposited in the American Bank and Trust of Baton Rouge . . ."

in an amount sufficient to satisfy that judgment. Plaintiffs now seek to execute that writ under Rule 69(a), Fed. R. Civ. Proc. by petitioning to make American Bank and Trust a garnishee in these proceedings; in the alternative, plaintiffs move for an order under Rule 70, Fed. R. Civ. Proc., directing the DHHR to pay the March 15 judgment, plus such additional fees and expenses as plaintiffs have incurred in securing compliance with that judgment. The state defendants, in turn have moved to quash the writ.

The state defendants maintain that the plaintiffs are not entitled to execution under Rule 69(a), or to a Rule 70 order directing compliance with the March 15 judgment. The state's position is set forth in the following series of hypotheses:

1. The court cannot order the payment of a money judgment under Rule 70 because that rule concerns only the "performance of specific acts."

2. Consequently, any relief must be ordered under the terms of Rule 69.

3. Rule 69(a) provides that the procedure on execution or in aid of execution "shall be in accordance with the practice and procedure of the state in which the district court is held, . . . except any statute of the United States governs to the extent that it is applicable."

4. Because no federal statute prescribes a garnishment procedure, DHHR funds may be seized only in accordance with the "practice and procedure" of the State of Louisiana.

5. The "practice and procedure" of Louisiana includes art. XII, § 10(C) of the 1974 Constitution of the State of Louisiana, which provides:

"The legislature shall provide a procedure for suits against the state, a state agency, or a political subdivision. It shall provide for the effect of a judgment, but no public funds shall be subject to seizure. No judgment against the state, a state agency, or a political subdivision shall be exigible, payable, or paid except from funds appropriated therefor by the legislature or by the political subdivision against which judgment is rendered."

6. Because Louisiana law proscribes the seizure of public agency funds, relief cannot be awarded under Rule 69.

The court has parsed the state defendants' argument in detail because it is a delicately wrought chain of apparent logic that leads to an ineluctably wrong conclusion. The defendants would have the court read the Federal Rules of Civil Procedure

in such fashion as to permit Louisiana or any other state to ignore a federal judgment against it merely by enacting a statute prohibiting the garnishment of state funds. If the State of Louisiana may be relieved from satisfying this judgment by a provision enacted in the past, albeit for a different purpose, and embedded in the Constitution, then any other state may achieve the same result.

[2] The issue here is not one of judicial confrontation with the state. It is one of implementation of a Congressional mandate. Following the decision in ***Alyeska Pipeline Service Co. v. Wilderness Society***, 1975, 421 U. S. 240, 95 S. Ct. 1612, 44 L. Ed. 2d 141, the Congress might have chosen to take no legislative action. Or it might have decided to broaden the basis for an award of attorneys' fees against private litigants but not to permit their recovery from the states. Instead it chose to enact legislation granting the right to recover attorneys' fees against all litigants as a means of strengthening its efforts to protect individual rights under the powers conferred by Section 5 of the Fourteenth Amendment to the Constitution. When Congress determines to act pursuant to the powers conferred on it by the Fourteenth Amendment, its enactments take precedence over the laws of the states. Neither state law nor the Eleventh Amendment protects states from suits under such laws. ***Fitzpatrick v. Bitzer***, 1976, 427 U. S. 445, 96 S. Ct. 2666, 49 L. Ed. 2d 614.

[3] Although Congress has spoken clearly, the state defendants in effect contend that a judgment against a state pursuant to the statutory command is merely hortatory, and the state may elect not to satisfy it. But the statutes of the Congress and the judgments of the federal courts enforcing them are not precatory. They are, as the Constitution declares, the supreme law of the land. U. S. Const. art. VI.

The Fifth Circuit has recently upheld an order issued under Rule 70 that directed state defendants to pay a money judg-

ment. In *Gates v. Collier*, 5th Cir., 1977, 559 F. 2d 241, the court directed the payment of attorneys' fees to successful plaintiffs under 42 U. S. C. A. §1988, the statute involved here. This is a recent, fully considered construction. This trial court would be bound by that interpretation even were its views different. *Gates* is authority both for the award of attorneys' fees against the state, and for the propriety of using Rule 70 for such a monetary allowance.

[4] The same procedure was approved in *Gilbert v. Johnson*, 5th Cir. 1974, 490 F. 2d 827, where the court held that the plaintiff properly sought monetary relief for unlawful dismissal from his position with a Veterans Administration Hospital under Rule 70. *Cf., Finney v. Hutto*, 8th Cir. 1977, 548 F. 2d 740 . These cases indicate that Rule 70 may be used as a means to collect a money judgment rendered in an equitable proceeding. Consequently, the relief the plaintiffs seek is permissible under Rule 70.

[5] The difficult problems of construing Rule 69 need not be faced because relief is available under Rule 70. However, perhaps supererogatorily, those problems will be discussed so that the appellate court will have my views before it should that court reach the issue. Rule 69(a) provides, in part:

"The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, . . . except that any statute of the United States governs to the extent that it is applicable."

The defendants correctly insist that the state "practice and procedure" to which Rule 69(a) refers includes states exceptions of particular property from execution, such as Louisiana's constitutional proscription against the seizure of public funds. La. Const. art. XII, §10(c). But if a federal statute is

applicable, federal statutory exemptions govern execution practice, Drafter's Committee Note of 1937 to Rule 69(a), 7 Moore's Federal Practice ¶69.01[2] (2d Ed. 1975). It would be anomalous to interpret the rule so that an applicable federal statute imports the federal exemptions of property from execution, while the state "practice and procedure" referred to in the same sentence does not include the protection of state exemptions. *Cf.*, ***United States v. Miller***, 3d Cir. 1956, 229 F. 2d 839.

If the plaintiff relies on the state procedure, the state exemption is applicable. On the other hand, if the provisions of 42 U. S. C. A. §1988 are applicable, then that "statute of the United States governs." It is literally true that §1988 says nothing about the means of collecting the attorneys' fees it authorizes. Further, those federal statutes cited by the 1937 committee as controlling under Rule 69 speak of execution directly, while §1988 does not.

[6, 7] However, a remedial statute should not be read as if it were a lexicon for scriveners. "The duty of ascertaining [an enacted law's] meaning is difficult enough at best and one certain way of missing it is by reading it literally . . ." Address by Judge Learned Hand, April 10, 1959, in Leflar, Appellate Judicial Opinions 73 (1974). While §1988 does not mention the method of its enforcement, the origin and purpose of the 1976 amendment suggest that Congress intended both to create the entitlement to the fees and to provide a means of enforcing this remedy. The statute was adopted to provide attorneys' fees in situations where they were not available under the ***Alyeska*** rule. It was intended to apply to states and state officials. And it was intended to be effective against them, not to be hortatory. The Senate report recites:

"As with the cases brought under 20 U. S. C. §1617, the Emergency School Aid Act of 1972, defendants in these cases are often State or local bodies or State of local officials.

"In such cases it is intended that the attorneys' fees, like other items of costs, ***will be collected either directly from the official, in his official capacity, from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party).***"

S. Rep. No. 94-1011, 94th Cong., 2d Sess. (1976), U. S. Code Cong. & Admin. News, 1976, pp. 5908, 5913. (Emphasis added.) Within the last month, the Fifth Circuit has twice held that judicial interpretation of §1988 is to be guided by this passage. ***Gates, supra,*** at 243; ***Universal Amusement Company v. Vance,*** 5th Cir. 1977, 559 F. 2d 1286, at 1301 & n. 36. See also, ***Finney v. Hutto,*** 8th Cir. 1977, 548 F. 2d 740, 742. The evident purpose of the statute compels us to construe §1988, not state procedure, as being applicable for purposes of Rule 69.

This conclusion is buttressed by the history of Rule 69. That rule was originally drafted to follow 28 U. S. C. §729 (1940), a statutory predecessor to 42 U. S. C. §1988. 7 Moore's Federal Practice ¶69.01[2] (2d Ed. 1975). At that time § 1988 said nothing about attorneys's fees but provided merely:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and

> laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

It then specifically contemplated that state and federal law would play complementary roles in securing civil rights. It is reasonable to believe that, in amending §1988, Congress intended to alter those respective roles, and to give extra encouragement to plaintiffs who seek to enforce civil rights in federal courts. Congress thus gave further emphasis to the federal interest in civil rights enforcement. The same federal interest that led to the creation of the right must extend to an adequate means of enforcing it. Construing Rule 69 to permit the recovery of attorneys' fees against states notwithstanding a state proscription against the seizure of public funds is consistent with that interpretation.

Conversely, state procedure was held to govern federal execution of judgments in cases where there was no significant federal interest in the remedy. In ***Yazell v. United States***, 1966, 382 U. S. 341, 86 S. Ct. 500, 15 L. Ed. 2d 404 ***aff'g United States v. Yazell***, 5th Cir. 1964, 334 F. 2d 454, the Supreme Court held that the law of coverture in Texas precluded the United States from collecting on a Small Business Administration disaster loan from the separate property of the debtor wife. The court said:

> We do not here consider the question of the constitutional power of Congress to override state law in these circumstances by direct legislation. . . . We decide only that this Court, in the absence of specific congressional action, should not decree in this situation that implementation of federal interests requires overriding the particular state rule involved here.

382 U. S. at 352, 86 S. Ct. at 506.

Here, however, Congress has acted. *Cf.*, *Huddleston v. Dwyer*, 1944, 322 U. S. 232, 64 S. Ct. 1015, 88 L. Ed. 1246 holding that state law controls the question whether a county must levy a tax to pay off bonds on a cause of action arising under state law.

The plaintiffs have stated in oral argument that they have no preference with respect to the type of relief granted, while the state defendants have stated that, if relief is to be granted, they would prefer an order issue pursuant to Rule 70.

[8] State defendants were given an opportunity, even after these motions were heard, to suggest a manner in which they would satisfy the judgment. But they have not offered any kind of compliance with the judgment, direct or indirect, soon or after an interval. This court would not be fulfilling its duty if it failed to enforce the constitutional statutes of the Congress. Pursuant to that duty, it grants the plaintiffs the relief they seek in accordance with the procedure set forth in Rule 70.

IV

[9] In accordance with this opinion, an order shall issue directing state defendants to pay plaintiffs' attorneys from DHHR funds those fees and costs specified in the March 15, 1977 judgment, plus interest.

In addition, the plaintiffs seek attorneys' fees and costs to compensate them for the present action to enforce the March 15 judgment. The Fifth Circuit Court of Appeals has not decided whether such relief is available on facts such as those before the court. The Court of Appeals has, however, held that an award of attorneys' fees under Title II of the Civil Rights Act of 1964, *supra*, may include compensation

for the defense of an appeal on the propriety of attorneys' fees. ***Miller v. Amusement Enterprises***, 5th Cir. 1970, 426 F. 2d 534, 539. The state defendants here have contested the plaintiffs' right to attorneys' fees through resistance, rather than appeal. The cost of overcoming that resistance, like the cost of defending an appeal successfully, is rightly compensable under 42 U. S. C. A. §1988, the terms of which are identical to the provisions regarding attorneys' fees in Title II.

The parties have stipulated that, if this amount is recoverable, the sum due is $2,322.00 to the Children's Defense Fund, and $1,000.00 to William Rittenberg. These amounts will be added to the judgment.

West Key Number System

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

GARY W., ET AL.

VERSUS

STATE OF LOUISIANA, ET AL.

CIVIL ACTION
NO. 74-2412
SECTION "C"

Filed Nov. 16, 1977

ORDER FIXING SECURITY IN THE FORM OF ESCROW ACCOUNT IN LIEU OF SUPERSEDEAS BOND FOR STAY OF EXECUTION PENDING APPEAL

This cause came on to be heard on Motion of Defendant, Dr. WILLIAM CHERRY, Secretary of Louisiana Department of Health and Human Resources, for waiver of supersedeas bond as security for stay of execution granted by order herein on October 28, 1977, and it appearing to the court that an escrow account would be as appropriate as a supersedeas bond for security for the stay.

IT IS ORDERED that a supersedeas bond to secure the stay of execution granted by order herein on October 28, 1977, is not required and, in lieu of such supersedeas bond, the defendant, DR. WILLIAM CHERRY, within ten days thereafter shall place in an escrow account with a bank or other solvent depositary the sum of $225,000, which principal sum shall not be withdrawable nor transferable except on order to the bank or other solvent depositary by the Clerk of the United States District Court, Eastern District of Louisiana, and which shall come from the funds of the Department

of Health and Human Resources, notwithstanding any state constitutional or statutory provision to the contrary.

IT IS FURTHER ORDERED that the escrow account may be interest bearing and that the defendant may elect to withdraw interest for the use and benefit of the Department of Health and Human Resources or the State of Louisiana as such interest becomes withdrawable without encroaching upon the original $225,000 principal in the account.

IT IS FURTHER ORDERED that the Clerk of the United States District Court, Eastern District of Louisiana, shall issue an order directing the bank or other solvent depositary to pay from the escrow account to plaintiffs' attorneys, if they should prevail on appeal, the amount of attorneys' fees that has been awarded in this case, plus interest, with any remainder to be paid to defendant for the use and benefit of the Department of Health and Human Resources; or to pay defendant, if he should prevail on appeal, the entire amount of the escrow account for the use and benefit of the Department of Health and Human Resources. Said order shall issue within ten days after expiration of the time limit for applying for a Writ of Certiorari to the United States Supreme Court following a final decision by the United States Court of Appeals for the Fifth Circuit, unless a petition for Writ of Certiorari has been timely filed with the United States Supreme Court, or, if a petition for a Writ of Certiorari is filed, within ten days after a final decision by the United States Supreme Court.

IT IS FURTHER ORDERED that the terms of the escrow account shall incorporate this order so that the bank or other solvent depositary shall be required to deliver the funds in said escrow account immediately upon receipt of the order of the Clerk of Court, required by this order.

IT IS FURTHER ORDERED that nothing in this order shall be deemed to limit plaintiffs' right to collect from de-

fendant any attorneys' fee or interest owed their attorneys by defendant that exceeds the amount held in escrow.

DATED: November 15, 1977

Alvin B. Rubin/s/
UNITED STATES DISTRICT
JUDGE

GARY W. et al.

Plaintiffs-Appellees

V.

STATE OF LOUISIANA, ET AL.

Defendants

Dr. William Cherry, Secretary of the Louisiana Department of Health and Human Resources,

Defendant-Appellant

No. 77-3245

United States Court of Appeals
Fifth Circuit

July 31, 1980

GOLDBERG, Circuit Judge

This class action litigation concerning mentally retarded, emotionally disturbed, and other children from Louisiana who have been placed in Texas for care and treatment in institutions was commenced in 1974. Plaintiffs obtained relief ensuring adequate care and treatment for class members, *see Gary W. v. State of Louisiana*, 437 F. Supp. 1209 (E. D. La. 1976), and were held entitled to attorney's fees under the Civil Rights Attorneys' Fees Act of 1976, 90 Stat. 2641, 42 U. S. C. §1988. *See Gary W. v. State of Louisiana*, 429 F. Supp. 711 (E. D. La. 1977).

The judgment for attorney's fees was not appealed, but the state defendants refused to accede to plaintiffs' demands for payment. The plaintiffs then, on September 2, 1977, caused the clerk of the district court to issue a writ of *fieri facias* directing the United States Marshal for the Eastern District

of Louisiana to seize property of the Louisiana Department of Health and Human Resources ("DHHR") in order to satisfy the judgment. The defendants countered by moving to quash the writ of *fieri facias* on the ground that state law prohibits the seizure of public property to satisfy a judgment against the state or a state agency and by seeking relief from the judgment under Fed. R. Civ. P. 60(b) (1).

After a hearing, the district court denied defendants' motion for relief from judgment and issued an order based on Fed. R. Civ. P. 70 1/ directing defendant William Cherry, in his official capacity as Secretary of DHHR, to pay the judgment from DHHR funds. Defendants appeal from the court's denial of their Rule 60(b) motion and from its order compelling payment of the judgment.

[1, 2] A. *Rule 60(b) Motion.* A ruling on a motion under Rule 60(b) will not be overturned absent an abuse of discretion. *See Dugan v. United States*, 521 F. 2d 231, 233 (5th Cir. 1975); *Hand v. United States*, 441 F. 2d 529, 531 (5th Cir. 1971). Appellants' argument is that the trial court did not realize it had discretion to deny attorney's fees when it originally ruled on the request for attorney's fees and that its failure to exercise its discretion constituted "mistake, inadvertence or excusable neglect." Brief for Appellants at 34. However, even if the trial court had applied an incorrect legal standard when assessing attorney's fees, 2/ the proper way to challenge its

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1/ The state defendants indicated to the trial court that they preferred an order under Rule 70 to one under Rule 69. The plaintiffs stated that they were indifferent between these choices.

2/ It did not, but followed our decision in *Brown v. Culpepper*, 559 F.2d 274 (5th Cir. 1977), which held that prevailing plaintiffs in civil rights actions should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust. *Id* at 277; *See Christianburg Garment Co. v. E. E. O. C.*, 434 U. S. 412, 417, 98 S. Ct. 694, 698, 54 L. Ed. 2d 648 (1978).

ruling in the court of appeals is by appeal of its ruling, not by appeal of a denial of a Rule 60(b) motion. *See Silk v. Sandoval*, 435 F. 2d 1266 (1st Cir. 1971). Therefore, the district court's denial of the Rule 60(b) motion is affirmed.

[3] B. *Order compelling Payment.*

Appellants argue that federal courts lack power to ensure compliance with money judgments against states unless state law provides a means of enforcing such judgments. The Louisiana Constitution prohibits the payment of judgments against the state except from funds appropriated for that purpose by the legislature. 3/ On two occasions bills were introduced in the Louisiana legislature which would have authorized payment of the judgment, but neither bill was passed. Appellants urge that the federal court can do nothing to ensure compliance with its judgment 4/ because Fed. R. Civ. P. 69(a) 5/ provides

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3/ La. Const. art XII, §10(c) provides:

The legislature shall provide a procedure for suits against the state, a state agency, or a political subdivision. It shall provide for the effect of a judgment, but no public property or public funds shall be subject to seizure. No judgment against the state, a state agency, or a political subdivision shall be exigible, payable, or paid except from funds appropriated therefor by the legislature or by the political subdivision against which judgment is rendered.

4/ At oral argument, appellants suggested that appellees might seek a contempt citation against the Louisiana legislature for failing to appropriate funds to satisfy the judgment. However, the Louisiana legislature is not a party to this action. Moreover, the chaos in the state appropriations process appellants predict if the court's order is affirmed would be dwarfed by the disruption that would be caused by a contempt citation against the state legislature, if such a sanction is possible.

5/ Rule 69(a) states in relevant part:

Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with

that procedures for enforcement of a judgment are to be carried out in accordance with state law and because Fed. R. Civ. P. 70 6/ does not provide an alternate means for executing a money judgment.

This argument has recently been addressed and rejected by this court in *Gates v. Collier*, 616 F. 2d 1268 (5th Cir. 1980). *Gates* involved the enforcement of a money judgment for attorney's fees in a civil rights action against the state of Mississippi. A Mississippi statute prohibits the satisfaction of any judgment against the state "except by an appropriation therefor by the legislature." Miss. Code Ann. § 11- 45- 5 (1972). 7/ The court said:

> [W]here a state expresses its unwillingness to comply with a valid judgment of a federal district court, the court may use any of the weapons generally at its disposal to ensure compliance.

5/Continued
the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable.

6/ Rule 70 states in relevant part:
If a judgment directs a party to execute a conveyance of land or to deliver deeds or other documents or to perform any other specific act and the party fails to comply within the time specified, the court may direct the act to be done at the cost of the disobedient party by some other person appointed by the court and the act when so done has like effect as if done by the party . . . . The court may also in proper cases adjudge the party in contempt.

7/ Miss. Code Ann. § 11-45-5 (1972) provides:
A judgment or decree against the state shall not be satisfied except by an appropriation therefore by the legislature, and an execution shall not be issued against the state.

> Only when the district court's response to the recalcitrance of a litigant is so inappropriate under the circumstances as to amount to an abuse of discretion will the Court of Appeals intervene . . . If statutory authority is needed for the court's actions, it may be found in Fed. R. Civ. P. 70.

Gates. supra, 616 F. 2d at 1271.

We perceive no relevant distinction 8/ between *Gates* and the instant case. In both cases, an order directing the responsible state official to satisfy the judgment out of state funds is the only reasonable way to ensure compliance with a valid federal judgment.

Therefore, the decision of the district court is affirmed, and the case remanded for a determination of attorney's fees for

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8/ Appellees suggest that *Gates* can be distinguished because the Mississippi statute, unlike the Louisiana constitutional provision, *See* n. 3 *supra*, does not expressly prohibit seizure of public funds. We see no relevance to this distinction, since the provisions in each state provide that judgment against the state shall only be satisfied by an appropriation for that purpose by the state legislature. Also, the Mississippi statute prohibits the issuance of executions against the state. Therefore, Mississippi state property is not subject to seizure by writ of execution.

A second difference is that the Louisiana prohibition is contained in the state constitution, whereas the Mississippi prohibition is contained in a statute. Under the Supremacy Clause of the United States Constitution, U. S. Const. art.,VI cl. 2, state constitutional provisions, as well as state statutes, must comport with federal law. Therefore, this distinction, too, is irrelevant to the rationale of *Gates. See Gates, supra*, 616 F. 2d at 1272.

work performed on this appeal. *See, e. g., Miller v. Carson,* 563 F. 2d 741, 756 (5th Cir. 1977).

AFFIRMED and REMANDED.

West Key Number System

Nazareth GATES et al.,
Plaintiffs-Appellees,

v.

John COLLIER, Superintendent of the Mississippi State Penitentiary, et al.
Defendants-Appellants.

No. 79-1844

United States Court of Appeals
Fifth Circuit

May 14, 1980

JAMES C. HILL, Circuit Judge:

This Court is not unanimous in its resolution of the two issues presented. All of us agree on the resolution of the issue presented in Part I. However, in Part II, Judges Brown and Randall concur with Judge Hill dissenting.1/

This litigation over conditions at Mississippi's Parchman Penitentiary began in 1971. In 1974 we affirmed the district court's finding that various practices existing at Parchman violated the constitutional rights of inmates. 501 F. 2d 1291

1/ The appellate opinion procedure used in this case is not uncommon. *See, e. g., Usery v. Tamiami Trail Tours, Inc.*, 531 F. 2d 224, 239 (5th Cir. 1976); *United States v. Register*, 496 F. 2d 1072, 1075-76 (5th Cir. 1974), *cert. denied*, 419 U. S. 1120, 95 S. Ct. 802, 42 L. Ed. 2d 819 (1975); *Stanga v. McCormick Shipping Corp.*, 268 F. 2d 544, 546, 551 (5th Cir. 1959). *Cf. Grigsby v. Coastal Marine Service of Texas, Inc.*, 412 F. 2d 1011, 1023 (5th Cir. 1967).

(5th Cir. 1974). The succeeding 5 years of litigation primarily involved the issue of attorneys' fees. In our most recent consideration of this case we affirmed awards of attorneys' fees plus expenses in favor of the plaintiffs and reversed the district court's order denying fees for appellate proceedings. 559 F. 2d 241 (5th Cir. 1977). On January 25, 1979, the district court entered an order reaffirming its original award and awarding fees for appellate work. Two aspects of that order are now challenged by the defendants. First, the order directs that Mississippi's Auditor and Treasurer be added as defendants and that the other defendants submit a requisition to the Auditor for the issuance of a warrant upon the Treasurer to satisfy the judgment out of funds appropriated for the operation of Parchman or out of any other funds subject to the control of the Treasurer. Second, the order adds to the principal amounts owing for attorneys' fees and other costs, post-judgment interest at the rate of 8% per annum.2/

I. *The Directive to Pay*

Defendants contend that the district court acted outside the scope of its authority in ordering the State Auditor to issue a warrant upon the State Treasurer and ordering the State Treasurer in turn to satisfy the judgment. We are directed to several provisions of the Mississippi Code which limit the authority of the State Treasurer to disburse state funds. In particular, Miss. Code Ann. § 11-45-5 (1972) prohibits the satisfaction of any judgment against the State "except by an appropria-

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2/ Interest on the initial award of $41,750 for attorneys' fees and $10,986.05 for other costs runs from February 14, 1973, the date of the original judgment. Interest on the supplemental award of $2,562.50 for time spent on appeal runs from August 10, 1978.

tion therefore by the legislature." 3/ The district court's order, it is urged, is contrary to the laws of Mississippi and requires the State Auditor and the State Treasurer to violate these valid laws. Thus, we are urged to hold that, unless the Mississippi statutes are declared unconstitutional, these plaintiffs must simply wait until the State voluntarily satisfies the judgment. 4/

[1] The awards which the district court has ordered the defendants to satisfy out of state funds were made pursuant to the Civil Rights Attorneys' Fee Awards Act of 1976, 42 U. S. C. A. §1988. In providing statutory authority for the award of attorneys fees to successful civil rights claimants, Congress was acting pursuant to the enforcement powers conferred on it by Section 5 of the Fourteenth Amendment. *See Hutto v. Finney*, 437 U. S. 678, 693-94, 98 S. Ct. 2565, 2575-76, 57 L. Ed. 2d 522 (1978). *Hutto* made it clear that, by exercising its power under Section 5, Congress successfully

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3/ Two other sections of the Mississippi Code relating to the State Treasurer's authority are quoted in defendants' brief:

Miss. Code Ann. § 7-9-9 (1972):

> It shall be the duty of the state treasurer to receive and keep moneys of the state in the manner provided by law, [and] to disburse the same agreeably to law . . . .

Miss. Code Ann. § 7-9-13 (1972):

> It shall not be lawful for the state treasurer to pay or receive any money on account of the state but on the warrant or certificate of the auditor, issued pursuant to law.

4/ There is no indication that the plaintiffs have attempted to take their valid judgment and levy on state property. However, the State does not argue that a judgment creditor *must* proceed in that fashion.

abrogated the States' Eleventh Amendment immunity. 5/ Thus, it is now beyond dispute that a federal district court has the authority to order that attorneys' fees be paid out of a state's treasury. The defendants do not disagree. Their position is, in effect: you can order us to pay, but you can't make us pay if we don't want to.

[2, 3] Neither *Hutto* nor the legislative history of the Act address the question of how to make an unwilling state or it's officials satisfy a judgment for attorneys' fees. This is not surprising however, for it has never been the practice of Congress, when providing a statutory basis for the recovery of money damages or costs including attorneys' fees, to specify in the same legislation the appropriate means of enforcing the judgment. In all likehood, Congress assumed it was unnecessary to consider the subject because the Federal Rules of Civil Procedure contains a provision for the execution of district court judgments, Fed. R. Civ. P. 69 and a provision authorizing the court to appoint an individual to do any act on behalf of a party who has refused to comply with the judgment himself, Fed R. Civ. P. 70. We have been cited to no authority, nor have we found any to indicate that these statutes do not apply to a state and its officials *Cf. Gary W. v. State of Louisiana*, 601 F. 2d 240, 246 (5th Cir. 1979). In addition, "[a] federal court's interest in orderly, expeditious proceedings," *Hutto v. Finney*, 437 U. S. at 696, 98 S. Ct. at 2577, justifies any reasonable action taken by the court to secure compliance with its orders. In *Hutto*, the Court remarked: "[A] federal court may treat a State like any other litigant when it assesses costs," 437 U. S. at 696, 98 S. Ct. at 2577,

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5/ The *Hutto* court also found justification for imposing attorneys' fees on states in " 'the inherent authority of the Court in the orderly administration of justice as between all parties litigant.' " 437 U. S. at 696, 98 S. Ct. at 2577 (quoting *Fairmont Creamery Co. v. Minnesota* 275 U. S. 70, 74, 48 S. Ct. 97, 99, 72 L. Ed. 168 (1927)).

and "[w]hen a State defends a suit for prospective relief it is not exempt from the ordinary discipline of the courtroom" *Id.* at 695-96 n. 24, 98 S. Ct. at 2576 n. 24. We think this is adequate support for the proposition that, where a state expresses its unwillingness to comply with a valid judgment of a federal district court, the court may use any of the weapons generally at its disposal to ensure compliance. "[F]ederal courts are not reduced to issuing [judgments] against state officers and hoping for compliance" *Id.* at 690, 98 S. Ct. at 2574. Only when the district court's response to the recalcitrance of a litigant is so inappropriate under the circumstances as to amount to an abuse of discretion will the Court of Appeals intervene. Here, the district court acted well within its authority to ensure compliance with its lawful orders. If statutory authority is needed for the court's actions, it may be found in Fed. R. Civ. P. 70. 6/ The defendants have made it abun-

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6/ Rule 70 states in pertinent part:

If a judgment directs a party to . . . perform any . . . specific act and the party fails to comply within the time specified, the court may direct the act to be done at the cost of the disobedient party by some other person . . . The court may also in proper cases adjudge the party in contempt. Fed. R. Civ. P. 70.

In *Gary W. v. State of Louisiana*, 441 F. Supp. 1121 (E. D. La. 1977), the plaintiffs, after unsuccessful attempts to collect on their judgment, petitioned the court for an order directing the Louisiana Department of Health and Human Resources to pay a judgment for attorneys' fees. In granting the order, Judge Rubin, sitting by designation on the district court, rejected the argument that Rule 70 may not be invoked to secure satisfaction of a judgment against the State of Louisiana for attorneys' fees. In dictum, Judge Rubin also rejected the argument that a garnishment order under Fed. R. Civ. P. 69 could not be granted because of a Louisiana statute prohibiting the satisfaction of a judgment against the State except from funds appropriated for that purpose by the state legislature. In response to this argument, Judge Rubin stated that Louisiana could not simply elect not to pay an award made pursuant to an Act of Congress. Support was found in the Supremacy Clause of the Constitution. An appeal is now pending before this Court.

dantly clear that they intend to resist the judgment until the bitter end. Given such obstinance, we think it beyond peradventure that the remedy fits the wrong.

[4] We recognize that our discussion thus far does not directly address the defendants' argument that they cannot be required to violate the laws of Mississippi. The defendants misconceive the issue. As Judge Rubin of this Court, sitting by disignation in *Gary W. v. State of Louisiana*, 441 F. Supp. 1121 (E. D. La. 1977), responded when recently confronted with the identical argument: "The issue here is not one of judicial confrontation with the state. It is one of *Implementation of a Congressional mandate.*" *Id.* at 1125 (emphasis added) The italicized words provide the key. Congress has declared that states and their officials who violate federal civil rights laws must reimburse the successful plaintiff for costs incurred in seeking redress. To strike down the order in this case because it conflicts with the laws of Mississippi would be no different than reversing a bare judgment for attorneys' fees. In either case, we would be allowing the state, by legislative action, to recloak itself with the Eleventh Amendment immunity which Congress has chosen to remove. Such a result would be contrary to the command of the Supremacy Clause of the United States Constitution. 7/

II. Interest on the Awards 8/

Defendants challenge the authority of the District Court to add post-judgment interest on attorneys' fees and out-of-

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7/ "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land." U. S. Const. Art. VI, cl 2.

8/ Part II was authored by Judge Brown.

pocket costs. We believe that interest was properly awarded on attorneys' fees but not on costs.

A

Defendants vigorously contend that under this Court's decision in *Carpa, Inc. v. Ward Foods, Inc.*, 567 F. 2d 1316 (5th Cir. 1978), we are precluded from awarding interest on attorney's fees and costs under the Civil Rights Attorneys' Fee Awards Act, 42 U. S. C. A. §1988 (hereafter referred to as §1988 or the Act). 9/ Despite Judge Hill's strong expressions, see (dissent), pp. 1283-1284, we fully subscribe to principles of *stare decisis* and recognize that a decision by one panel of this Court is binding on other panels. E. g., *Trunkline Gas Co. v. Federal Energy Regulatory Commission*, 608 F. 2d 582, 583 (5th Cir. 1979). But we are convinced that *Carpa* is not controlling on the question before us and we have not been unfaithful to it in deciding the way we do.

In *Carpa*, this Court held that under 15 U. S. C. A. § 15 (hereafter referred to as §15), interest on attorneys' fees cannot be recovered. Section 15 provides: "Any person who shall be injured in his business or property by reason of anything forbidden in the antiturst laws . . . shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." The Court's holding was a very narrow one. As the Court stated: "Our holding that attorneys' fees in antitrust cases are not to bear interest *implies nothing*

9/ The Act Provides:

In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of a provision of the United States Internal Revenue Code or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Whatsoever about the propriety of interest on attorneys' fees authorized by other statutes." 567 F. 2d at 1323 (emphasis added). This language suggests in clear and unmistakable terms that each attorneys' fees statute must be carefully analyzed to determine whether interest should be awarded.

The Court in *Carpa* gave two reasons which together led to its conclusion. First, the Court pointed out that attorneys' fees are defined under §15 as part of costs and the costs do not bear interest. Second, the Court emphasized the existence of treble damages under §15 and suggested that the need for interest on attorneys' fees was therefore less critical in the antitrust context than in other contexts.

In analyzing *Carpa*, Judge Hill in dissent reads the case as relying exclusively on the definition of attorneys' fees as part of costs. See (dissent), p. 1282. Since § 1988 also defines attorneys' fees as part of costs, see note 2, ***supra***, Judge Hill reasons ***ipso facto*** that interest on attorneys' fees under §1988 is not recoverable.

In our view, this reading of *Carpa* is misplaced, since it completely overlooks the Court's repeated emphasis on the treble damages provision in §15. For instance, the Court in *Carpa* stated:

> In the absence of further Congressional guidance, and in ***light of the fact that the provision of treble damages as well as attorneys' fees in the antitrust laws affords sufficient scope to the remedial purposes of encouraging private enforcement of the antitrust laws and facilitating the procuring of legal services,*** 5/ we see no basis for stretching the applicable statutory language to provide interest on the award of attorneys' fees to successful antitrust plaintiffs.

567 F. 2d at 1322-23 (emphasis added). The footnote accompanying this passage elaborated:

> 5. We note in this regard that the treble damage provisions of the antitrust laws were designed in part to help finance litigation expenses in private antitrust suits. By creating the possibility of sizeable damage awards, Congress encouraged attorneys to try antitrust cases on a contingent fee basis.

Id. at 1323 n. 5. Later, the Court reemphasized:

> The language and history of a given statute might suggest that the public purposes underlying the statutory authority for attorneys' fees would be materially advanced by allowance of interest, ***and the absence of a treble damage provision which complements the attorneys' fee provision would also require consideration.***

Id. at 1323 (emphasis added).

The *Carpa* court's instruction to consider carefully the characteristics of the precise statute at issue would be completely undercut by Judge Hill's view that *Carpa* was based exclusively on the definition of attorneys' fees as part of costs. In our view, *Carpa* permits - indeed, compels - a comprehensive analysis of the statute at issue. With that in mind, § 1988 should be carefully analyzed.

B

Section 1988 was enacted by Congress in 1976 in response to the Supreme Court's decision in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U. S. 240, 95 S. Ct. 1612, 44 L. Ed. 2d 141 (1975), which held that only Congress, not the Courts, could determine which laws were important enough

to justify the awarding of attorneys' fees under the "private attorney general" principle. The Act is farreaching. It applies to suits for equitable relief or damages under the following statutes: 42 U. S. C. A. §1981, forbidding discrimination by Government officials and private persons in contractual relations and used frequently to challenge discrimination in employment and use of recreational facilities; 42 U. S. C. A. §1982, forbidding discrimination in real estate transactions; 42 U. S. C. A. §1983, prohibiting denial of constitutional and civil rights by persons acting under color of state law; 42 U. S. C. A. §1985, dealing with conspiracies to deny persons equal protection of the laws; 42 U. S. C. A. §1986, providing a cause of action against certain individuals having power to prevent violations of § 1985 out who do not do so; 42 U. S. C. A. §2000d, *et seq.*, prohibiting discrimination based on race, color, or national origin in federally funded programs; and 20 U. S. C. A. §1681, *et seq. prohibiting discrimination* based on sex, blindness, or visual impairment in the use of federal funds in certain educational programs. The Act also authorizes attorneys' fees for prevailing taxpayers in civil suits by or on behalf of the United States under the Internal Revenue Code.

As the legislative history of §1988 makes clear, Congress believed that the awarding of attorneys' fee is critical to the enforcement of the civil rights laws. The House Report, H. Rep. No. 1558, 94th Cong., 2d Sess. (1976) (House Report), states:

"The effective enforcement of Federal civil rights statutes depends largely on the efforts of private citizens. Although some agencies of the United States have civil rights responsibilities, their authority and resources are limited. In many instances where these laws are violated, it is necessary for the citizen to initiate court action to correct the illegality. Unless the judicial remedy is full and complete, it will remain a meaningless right. Because a vast majority of the victims of

civil rights violations cannot afford legal counsel, they are unable to present their cases to the courts. In authorizing an award of reasonable attorney's fees, [the proposed legislation] is designed to give such persons effective access to the judicial process where their grievances can be resolved according to law."

Id. at 1. Similarly, the Senate Reprot, S. Rep. No 94-1011, 94th Cong., 2d Sess. (1976) (Senate Report), ***reprinted in*** [1976] U. S. Code Cong. & Admin. News, p. 5908 (hereafter reffered to as U. S. C. C. A.) states:

> In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it cost them to vindicate these rights in court.

Id. at 2, USCCA at 5910. The Senate Report also quotes with approval the following language from the Supreme Court's opinion in ***Newman v. Piggie Park,*** 390 U. S. 400, 402, 88 S. Ct. 964, 966, 19 L. Ed.2d 1263, 1265-66 (1968):

> When a plaintiff brings an action under [Title II] he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a "private attorney general," vindicating a policy that Congress considered of the highest priority. If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the Federal courts. Congress therefore enacted the provision for counsel fees [42 U. S. C. A.

> §2000a-3(b) to encourage individuals injured by racial discrimination to seek judicial relief under Title II.

Senate Report at 3, USCCA at 5910.

Very similar ideas were expressed at the debates on the legislation. As Congress-woman Holtzman stated:

> Plaintiffs who suffer discrimination and other infringements of their civil rights are usually not wealthy people. The organizations who have helped them bring their cases are frequently not well financed. The Justice Department does not have the resources to bring suit for every civil rights violation. Thus, many people, deprived of their civil rights may not as a practical matter be able to do anything about it. It is not right to deny people who cannot afford to pay attorneys' fees the availability of justice through our courts.

122 Cong. Rec. H. 12164 (daily ed. Oct. 1, 1976). And Congressman Seiberling, the original sponsor of legislation permitting the awarding of attorneys' fees in civil rights cases, stated:

> If the law does not authorize the awarding of attorneys' fees in meritorous civil rights cases, many potential plaintiffs will be deterred from bringing deserving cases to remedy violations of the Constitution, especially those cases in which the appropriate relief is primarily equitable or injunctive rather than monetary.

Id. at H. 12165.

Recognizing Congress' clear signals to apply the Act "broadly to achieve its remedial purpose." ***Mid-Hudson Legal Services, Inc., v. G & U, Inc.,*** 578 F. 2d 34, 37 (2d Cir. 1978), Courts

have taken an extremely liberal view on nearly every interpretative question that has arisen thus far under § 1988. For example, the Courts have held that when a party files a case under a federal statute covered by §1988 and also files a pendent state claim which is dispositive, the Act nonetheless entitles the prevailing party to attorneys' fees. See, e. g., ***Seals v. Quarterly County Court***, 562 F. 2d 390 (6th Cir. 1977); ***Bond v. Stanton***, 555 F. 2d 172 (7th Cir. 1977). Similarly, although the Act provides that the Court "in its discretion, ***may*** allow the prevailing party [attorneys' fees]" (emphasis added), Courts have held that unless the awarding of such fees would, because of special circumstances, be unjust attorneys' fees should be awarded to the prevailing party as a matter of course. See, e. g., ***Iranian Students Association v. Edwards***, 604 F.2d 352 (5th Cir. 1979); ***Sethy v. Alameda County Water District***, 602 F. 2d 894 (9th Cir. 1979); ***Wharton v. Knefel***, 562 F. 2d 550 (8th Cir. 1977); ***Brown v. Culpepper***, 559 F. 2d 274 (5th Cir. 1977). Furthermore, it has been consistently held that the Act is to be retroactively applied. ***Gore v. Turner***, 563 F. 2d 159 (5th Cir. 1977); ***Bond v. Stanton, supra.*** And Courts have held that a party need not win on every issue to be a "prevailing party" under the Act. See, e. g., ***Bonnes v. Long***, 599 F. 2d 1316 (4th Cir. 1979); ***Brown v. Culpepper, supra.*** See generally Lipson, Beyond *Alyeska–Judicial* Response to the Civil Rights Attorneys' Fees Act, 22 St. Louis U. L. J. 243 (1978).

[5] While admittedly the Courts in the cases just cited had somewhat more guidance from the legislative history than we have here, we believe that a liberal reading of the Act is also appropriate with respect to the awarding of interest on attorneys' fees. We do not mean to suggest that Congress explicitly intended that interest on attorneys' fees be awarded. Congress probably never specifically considered the ques-

tion. 10/ On the other hand, we do not believe that Congress intended to bar recovery of interest on attorneys' fees. And the awarding of interest is entirely consistent with the purpose of the Act: to ensure effective enforcement of the civil rights laws. 11/

In analyzing the nature of the interest award, it must be understood that the awarding of interest is in no sense a wind-

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10/ However, contrary to the view of Judge Hill, see (dissent), p. 1281, it is at least arguable that by its cite to *Davis v. City of Los Angeles*, 8 EPD ¶9444, p. 5047 (C.D. Cal. 1974). Congress intended that interest on attorneys' fees be awarded. In *Davis*, the Court awarded attorneys' fees to be made within thirty days and added that "interest shall not begin to accrue if Defendant County of Los Angeles makes the said payment within thirty days after entry of this judgment. . . ." 8 EPD ¶ 9444, at 5049. *Davis* is cited in the Senate Report along with several other cases as one in which "the appropriate standards . . . are correctly applied." Senate Report at 6, USCCA at 5913. And the Senate Report states that cases such as *Davis* "have resulted in fees which are adequate to attract competent counsel, but which do not produce windfalls to attorneys. "*Id.*

11/ In trying to make sense out of a statute, it is "appropriate to look beyond the words to the purpose of the act." *Perry v. Commerce Loan Co.*, 383 U. S. 392, 400, 86 S. Ct. 852, 857, 15 L. Ed. 827, 833 (1966). See also *United States v. American Trucking Associations*, 310 U. S. 534, 543, 60 S. Ct. 1059, 1063, 84 L. Ed. 1345, 1350 (1940). Moreover, when "flesh[ing] out the portions of the law with respect to which . . . congressional enactment [does not] offer conclusive guidance." it is "proper [to consider] what may be described as policy considerations." *Blue Chip Stamps v. Manor Drug Stores*, 421 U. S. 723, 737, 95 S. Ct. 1917, 1926, 44 L. Ed. 2d 539, 550 (1975). These cases recognize that Courts are occasionally required to fill in the interstices of a statutory scheme. As a body composed of mere mortals, Congress cannot be expected to address every issue which may possibly arise in a particular case. The Court in *Carpa* had precisely these sound considerations of statutory construction in mind when it declared that "the language and history of a given statute and the public purposes underlying the statutory authority for attorneys' fees" must be considered. 567 F. 2d at 1323;

fall. Because a dollar today is worth more than a dollar in the future, "the only way [a party] can be made whole is to award him interest from the time he should have received the money." *Louisiana & Arkansas Railway Co. v. Export Drum Co.*, 359 F. 2d 311, 317 (5th Cir. 1966). Indeed, this case dramatizes the need for interest on attorneys' fees if the attorneys for the prevailing party are to be adequately compensated. Most of the fees at issue in this case were awarded in 1973. Because of inflation, these awards are worth far less today than they were seven years ago. Had the awards been made in 1973, the attorneys could have been drawing interest on that amount for the last seven years.12/

The appropriateness of awarding interest on attorneys' fees in the civil rights context becomes even clearer when §1988 is examined in light of the precise considerations expressed in *Carpa*. As stated above, *Carpa* relied on the existence of treble damages and on the definition of attorneys' fees as part of costs. Section 1988 is distinguishable on both bases.

First, there are no treble damage provisions under any of the civil rights statutes covered by §1988. Indeed, as the legislative history discussed above emphasizes, many of the litigants in civil rights cases have little or no money with which to hire a lawyer. Frequently the litigant is unable to obtain *any* damages under the applicable statute

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12/ The case before us is in no way atypical. The law books are filled with civil rights cases extending over decades. For a classic example, *See Singleton v. Jackson Municipal Separate School Dist.*, 348 F. 2d 729 (5th Cir. 1965) (Singleton I); 355 F. 2d 865 (5th Cir. 1966) (Singleton II); 419 F. 2d 1211 (5th Cir.) (en banc) (Singleton III) *rev'd*, 396 U. S. 290, 90 S. Ct. 608. 24 L. Ed. 2d 477, *cert. denied*, 396 U. S. 1032, 90 S. Ct. 612, 24 L. Ed. 2d 530 (1970); 426 F. 2d 1364 (5th Cir. 1970) (Singleton IV); 430 F. 2d 368 (5th Cir. 1970) (Singleton V); 432 F. 2d 927 (5th Cir. 1970) (Singleton VI); 509 F. 2d 818 (5th Cir. 1975) (Singleton VII).

but can seek only injunctive or declaratory relief. In Senate debate on the legislation, Senator Kennedy drew a sharp distinction between the civil rights and anti-trust contexts:

"The lawyer who undertakes to represent a client alleging a violation of the civil rights statutes covered by this bill faces significant uncertainty of payment, even where he has a strong case. For there is often important principles to be gained in such litigation, and rights to be conferred or enforced, but just as often no large promise of monetary recovery lies at the end of the tunnel. So *civil rights cases - unlike tort or antitrust cases - do not provide the prevailing plaintiff with a large recovery from which he can pay his lawyer.* That is why Congress has already decided in many recent civil rights laws to include provisions for recovery of attorneys' fees, in order to insure that the rights guaranteed by the laws are not lost through the inability of those who are supposed to benefit to obtain judicial enforcement of those rights."

122 Cong. Rec. S 17052 (daily ed. Sept. 29, 1976) (emphasis added). We can think of no type of litigation where "the absence of a treble damage provision which complements the attorneys' fee provision." *Carpa, supra,* 567 F. 2d at 1323, is more significant than in the civil rights context.

Second, while it is true that §1988 also defines attorneys' fees as part of costs, see note 9, supra, the legislative history makes clear that this was done for one reason and one reason only: to ensure that the Eleventh Amendment is no bar so that these fees are recoverable against Government officials acting in their official capacity. As this Court stated in *Morrow v. Dillard,* 580 F. 2d 1284, 1299 n. 18 (5th Cir. 1978):

"The Senate Report contemplated that by defining fees as costs there would be no problem in awarding fees against State officers acting in their official capacities . . . ."

See Senate Report at 5, USCCA at 5913; House Report at 7. In the anti-trust context, by contrast, the Court in *Carpa* could point to nothing to explain Congress's inclusion of attorneys' fees as part of costs. Certainly Congress was not trying to make clear th t attorneys' fees could be assessed against state and local Governments, since Congress intended that the anti-trust laws be inapplicable to suits against Government entities. 13/

Thus, in analyzing §1988 and its inclusion of attorneys' fees as part of costs, Congress' concern about the possible immunity of Government officials must be kept clearly in mind. This fact rebuts the assumption of Judge Hill that Congress intended to define attorneys' fees as part of costs for all purposes.

To read *Carpa* as Judge Hill does would be to place Congress in a no win situation. If Congress specifies attorneys' fees as part of costs, then interest cannot be awarded, and in cases such as this, attorneys' fee awards will be inadequate. On the other hand, if Congress does not specify attorneys' fee awards as part of costs, it runs the risk that such fees will not be assessed against Government officials acting in their official capacity.

In addition, Judge Hill's view - that *Carpa* requires rejection of interest on attorneys' fees whenever they are defined as part of costs - would foreclose the possibility of recovering interest on attorneys' fees under a variety of other statutes. As of 1977, there were at least 75 statutes enacted by Congress

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13/ *See, e. g., Parker v. Brown*, 317 U. S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943). While the "state action" doctrine has been undercut recently, see e. g., *Lafayette v. Louisiana Power & Light Co.*, 435 U. S. 389, 402, 98 S. Ct. 1123, 1131, 55 L. Ed. 2d 364, 376 (1978), these recent inroads do not undercut *Parker* in any manner relevant to this issue.

authorizing attorneys' fees. See Berger, Court Awarded Attorneys' Fees: What is "Reasonable"? 126 U. Pa. L. Rev. 281, 303-04 n. 104 (listing statutes).14/

14/ For convenience, we reproduce the author's exhaustive collection of the statutes:

> Federal Contested Elections Act § 17, 2 U. S. C. § 396 (1970); Act of Nov. 21, 1974 (Freedom of Information Act amendments) § 1(b) (2), 5 U. S. C. §552(a) (4) (E) (Supp. V 1975); Privacy Act of 1974 § 3, 5 U. S. C. § 552a (g) (2) (B) (Supp. V 1975); Government in the Sunshine Act § 3, 5 U. S. C. A. § 552b(i) (Supp. 1977); Workmen's Compensation Acts § 208, 5 U. S. C. § 8127(b) (1970); Commodity Futures Trading Commission Act of 1974 § 106, 7 U. S. C. §§ 18(f), (g) (Supp. V 1975); Packers and Stockyards Act, 1921 § 309, 7 U. S. C. §210(f) (1970). Perishable Agricultural Commodities Act, 1930 § 7, 7 U. S. C. §§ 499g(b) , (c) (1970 & Supp. IV 1973); Agricultural Fair Practices Act of 1967, § 6, 7 U. S. C. §§ 2305(a), (c) (1970); Plant Variety Protection Act § 125, 7 U. S. C. § 2565 (1970); Bankruptcy Act § 1, 11 U. S. C. §§ 205, 641, 643, 644 (1970); Home Owners Loan Act of 1933, 12 U. S. C. § 1464(d)(8) (1970), *as amended by* Financial Institutions Supervisory Act of 1966, Pub. L. No. 89-695, § 102(a), 80 Stat. 1036 (1966); National Housing Act, 12 U. S. C. § 1730(m), *as amended by* Financial Institutions Supervisory Act of 1966, Pub. L. No. 89-695, § 102(a), 80 Stat. 1036 (1966); Federal Credit Union Act, 12 U. S. C. §1786(o) (1970), *as amended by* Act of Oct. 19, 1970, Pub. L. No. 91-468, § 1(3), 84 Stat. 1010 (1970); Federal Deposit Insurance Act, 12 U. S. C. § 1818(n) (1970), *as amended by* Financial Institutions Supervisory Act of 1966, Pub. L. No. 89-695 § 202, 80 Stat. 1036 (1966); Bank Holding Company Act Amendments of 1970 § 106(e), 12 U. S. C. § 2607(d) (Supp. V 1975); Clayton Act § 4, 15 U. S. C. § 15 (1970); Clayton Act § 4C, 15 U. S. C. A. § 15c (Supp. 1977), *as amended by* Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, § 301, 90 Stat. 1394; Clayton Act § 16, 15 U. S. C. A. § 26 (1976), *as amended by* Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, § 302(3), 90

A large number of these statutes define attorneys' fees as part of costs. See, e. g., Federal Contested Elections Act, § 17, 2 U. S. C. A. § 396; Freedom of Information Act Amendments,

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14/ Continued

Stat. 1396; Federal Trade Commission Act, 1975 Amendments § 202(a), 15 U. S. C. § 57a(h) (Supp. v 1975); Unfair Competition Act § 801, 15 U. S. C. § 72 (1970); Securities Act of 1933 § 11, 15 U. S. C. § 77k(e) (1970); Trust Indenture Act of 1939 § 323, 15 U. S. C. § 77 www(a) (1970); Securities Exchange Act of 1934 §§ 9, 18, 15 U. S. C. §§ 78i(e), 78r(a) (1970); Jewelers' Liability Act (Gold and Silver Articles) § 1(b), 15 U. S. C. § 298(b). (c). (d) (1970); National Traffic and Motor Vehicle Safety Act of 1966 § 111, 15 U. S. C. § 1400 (1970); Truth in Lending Act § 408(a), 15 U. S. C. § 1640(a) (Supp. V 1975); Consumer Leasing Act of 1976 § 3, 15 U. S. C. A. § 1667b (Supp. 1977); Fair Credit Reporting Act § 601, 15 U.S.C. §§1681n. 1681o (1970); Equal Credit Opportunity Act § 503, 15 U. S. C. § 1691(e) (Supp. V 1975), *redesignated as* § 1691e(d) *and amended by* Equal Credit Opportunity Act Amendments of 1976, Pub. L. No. 94-239, § 6, 90 Stat. 253 (1976); Motor Vehicle Information and Cost Savings Act §§ 109, 409, 15 U. S. C. §§ 1918, 1989(a)(2) (Supp. V 1975); Consumer Products Safety Commission Improvements Act of 1976 §§ 10(a) (b), 15 U. S. C. A. §§ 2059(e), 2060(c) (Supp. 1977); Consumer Product Safety Act §§ 23, 24, 15 U. S. C. §§ 2072, 2073 (Supp. V 1975), *as amended by* Consumer Product Safety Commission Improvements Act of 1976, Pub. L. No. 94-284, §§ 10(c), (d) 90 Stat. 503 (1976); Hobby Protection Act § 3, 15 U. S. C. § 2102 (Supp. V 1975); Magnuson-Moss Warranty-Federal Trade Improvement Act § 110(a)(5), 15 U. S. C. § 2310(d) (Supp. V 1975); Copyrights Act § 1, 17 U. S. C. § 116 (1970), *redesignated as § 505 and amended by* Pub. L. No. 94-553, § 101, 90 Stat. 2541 (1976); Organized Crime Control Act of 1970 §901(a), 18 U. S. C. §1964(c) (1970); Omnibus Crime Control and Safe Streets Act of 1968 § 802, 18 U. S. C. § 2520 (1970); Emergency School Aid Act § 718, 20 U. S. C. § 1617 (Supp. V 1975); American-Mexican Chamizal Convention Act of 1964 § 5, 22 U. S. C. § 277d-21 (1970); International Claims Settlement Act of 1949 § 4, 64

§ 1(b)(2), 5 U. S. C. A. § 552 (a)(4)(E); Privacy Act of 1974, §3, 5 U.S.C.A. §552 a (g) (2) (B); Government in the Sunshine Act, § 3(a), 5 U. S. C. A. § 552b(i); Magnuson-Moss Warranty-

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14/ Continued

Stat. 13 (1950) (current version at 22 U. S. C. § 1623(f) (1970); Act of June 25, 1948 (Federal Tort Claims), ch. 646, 62 Stat. 984 (1948) (current version at 28 U. S. C. § 2678 (1970); Norris-LaGuardia Act § 7, 29 U. S. C. 107(e) (1970); Fair Labor Standards Amendments of 1974, § 6(d)(1), 29 U. S. C. § 216(b) (Supp. V1975); Employee Retirement Income Security Act of 1974 § 502, 29 U. S. C. § 1132(g) (Supp. V 1975); State and Local Fiscal Assistance Amendments of 1976 § 7(b), 31 U. S. C. A. § 1244(e) (Supp. 1977); Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972 §§ 13, 15, 33 U. S. C. §§ 928, 933 (Supp. V 1975); Federal Water Pollution Control Act Amendments of 1972 §§ 505, 507, 33 U. S. C. §§ 1365(d), 1367(c) (Supp. V 1975); Marine Protection, Research, and Sanctuaries Act of 1972 § 105, 33 U. S. C. § 1415(g)(4) (Supp. V 1975); Deepwater Port Act of 1974 § 16(d), 33 U. S. C. § 1515(d) (Supp. V 1975); Patent Infringement Act § 1, 35 U. S. C. § 285 (1970); Safe Drinking Water Act § 1449(d), 42 U. S. C. § 300j-8 (Supp. V 1975); Social Security Act § 206, 42 U. S. C. § 406 (1970); Clean Air Act § 12a, 42 U. S. C. § 185h-2(d) (1970); Voting Rights Act Amendments of 1975 § 402, 42 U. S. C. § 19731 (e) (Supp. V 1975); Civil Rights Attorney's Fees Awards Act of 1974 §2, 42 U. S. C. A. § 1988 (1976); Civil Rights Act of 1964 §§ 204, 706, 42 U. S. C. §§ 2000a-3(b), 2000e 5(k) (1970); Atomic Energy Act of 1954 § 1, 42 U. S. C. § 2184 (1970); Fair Housing Act of 1968 § 812, 42 U. S. C. § 3612(c) (1970); Crime Control Act of 1976 § 122(b), 42 U. S. C. A. § 3766(c) (4)(B) (1976); Noise Control Act of 1972 § 12, 42 U. S. C. § 4911(d) (Supp. V 1975); National Mobile Home Construction and Safety Standards Act of 1974 § 613, 42 U. S. C. § 5412(b) (Supp. V 1975); Railway Labor Act § 3, 45 U. S. C. § 153(p) (1970), Shipping Act, 1916 § 30, 46 U. S. C. § 829 (1970); Communications Act of 1934 §§ 206, 407, 47 U. S. C. §§ 206, 407 (1970); Act of Mar. 3, 1887 (aliens holding land) § 6, 48 U. S. C. § 1506 (1970); Interstate Commerce Act §§ 8, 15, 16, 222, 308, 417, 49 U. S. C. §§ 15(9), 16 (2), 322(b),

Federal Trade Improvement Act, § 110(d), 15 U. S. C. A. § 2310(d); Civil Rights Act of 1964 §§ 204, 706, 42 U. S. C. A. §§ 2000a-3(b), 2000e-5(k). We cannot believe that the Court in *Carpa*, with its emphatic language that each must be carefully considered, intended to decide the question of interest on attorneys' fees with respect to these and many other statutes.15/

[6] In sum, we believe that § 1988 should be liberally construed to permit the awarding of interest on attorneys' fees16/

Such a liberal approach finds general support both in the legislative history of §1988 and in the various cases interpreting it.

14/ Continued

908(b), 1017(b) (1970) Natural Gas Pipeline Safety Act Amendments of 1976 §8, 49 U.S.C.A. §1686(e) (1976); Housing and Rent Act of 1947 § 206, 61 Stat. 199 (1947) (repealed 1948); Defense Production Act of 1950, § 409, 64 Stat 811 (1950) (repealed 1951).

15/ Indeed, Judge Hill seems to suggest that attorneys' fees, no matter how they are defined, belong to that enigmatic category of costs. See (dissent), p. 1282. That means that given Judge Hill's reading of *Carpa*, interest cannot be recovered on attorneys' fees under any of the statutes listed in note 14, *supra*. Such reasoning stands stare decisis on its head and permits *Carpa* - an extremely narrow opinion - to do exactly what the Court did not want to do: resolve the issue of interest on attorneys' fees under the myriad other attorneys' fee provisions enacted by Congress.

16/ We are not troubled by this Court's Order in *Rainey v. Jackson State College*, 591 F. 2d 1000 (5th Cir. 1979). The cryptic Order "denied, could be based on at least three separate grounds, only one of which involves the present issue presented here. For example, the parties in *Rainey* seeking interest on attorneys' fees did so very late in the game, after the opinion for the Court approving the awarding of attorneys' fees had been written. The Court may well have denied the motion for interest simply because it came too late.

Nor do we believe that *Carpa* compels a contrary result. Because the *Carpa* decision was a very narrow one, and because the decision today is likewise a very narrow one, we disagree with Judge Hill's suggestion (dissent), p. 1283 that to award interest on attorneys' fees under § 1988, *en banc* reconsideration of *Carpa* is essential. With twenty-five Judges on this Court, it hardly serves good sound administration of justice to call an *en banc* session to reconsider a narrow decision arising under the antitrust laws that is readily distinguishable from the facts presented here.

[7] Accordingly, we affirm that part of the District Court's opinion holding that Appellees are entitled to interest on the initial award of $41,750 for attorneys' fees and on the supplemental award of $2,562.50 for time spent on appeal. We also hold, however, that the District Court erred in awarding interest on the out-of-pocket costs of $10,986.05. See *Supra* at 1270 n. 2.17/

17/ While Appellees seek affirmance of the District Court decision in all respects, they virtually concede that the awarding of interest on out-of-pocket costs was not proper. Their analysis rests on the argument that attorneys' fees should not be treated the same as other costs. E. g., Appellees', Brief, at 29 ("Congress' determination . . . to award attorney's fees as part of costs' (42 U. S. C. § 1988) does not indicate any intent to bring these attorneys' fees awards under the general rule against allowing interest on taxable costs of court "). Although there is little case law on the question, the view that out-of-pocket costs (as opposed to attornyes' fees) do not bear interest appears firmly established in our jurisprudence and Courts either explicitly or implicitly have accepted this principle. E. g., *Jesko v. American-First Title & Trust Co.*, 603 F. 2d 815, 820 n. 11 (10th Cir. 1979); *Carpa*, supra, *567 F. 2d at 1322*; *Duffer v. American Home Assurance Co.*, 512 F.2d 793, 800 (5th Cir. 1975); 20 C. J. S.Costs § 190, p. 422 (and cases cited therein).

Judge Hill will not concede that the cases cited above support the position that out-of-pocket costs do not bear interest, (dissent), pp. 1282 1283 even though *he* reads *Duffer* and *Carpa* as holding that costs

CONCLUSION

This case has flip-flopped from the District Court to this Court to the District Court and to this Court again for almost a decade. In 1972, the District Court held that the operation of Parchman Penitentiary infringed upon the constitutional

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17/ Continued

do not bear interest, p. 1282, and even though Appellees clearly concede in their brief that this principle of law is well established.

As Appellees point out, there are several distinctions between attorneys' fees and out-of-pocket costs. Whereas out-of-pocket costs are routinely awarded upon submission of a bill of costs, a much more elaborate documentation process is required with respect to attorneys' fees. And whereas Court costs may only be taxed after entry of final judgment, attorneys' fees may be assessed even if an action is settled and no final judgment is entered. Indeed, it is interesting that even though § 1988 defines attorneys' fees as part of costs, Courts have, for purposes of analysis, consistently separated attorneys' fees and other costs. See, e. g., *Morrow v. Dillard*, *supra*, 580 F. 2d at 1296 (Part IV of opinion contains heading "Attorney's Fees and Costs"); *McPherson v. School District No. 186*, 465 F. Supp. 749, 763 (S. D. Ill. 1978) (Immediately under the heading "Costs," the opinion begins "In addition to attorneys' fees, the plaintiffs' attorneys are seeking to have their out-of-pocket expenses assessed against the defendants as costs.") *Alsager v. District Court of Polk County, Iowa*, 447 F. Supp. 572, 580 (S. D. Iowa 1977) (holding that "counsel will also be permitted, in addition to attorneys fees, $2,000.00 in costs."); *Dawson v. Pastrick*, 441 F. Supp. 133, 143 (N. D. Ind. 1977) (Court's heading reads "Costs and Attorneys' Fees" and Court states that plaintiffs have asked for "costs and reasonable attorney fees").

As we have already stated, by defining attorneys' fees as part of costs, Congress was merely concerned with problems of immunity and did not intend for attorneys' fees to be treated as part of costs for all purposes. Moreover, the legislative history of § 1988 emphasizes the need in civil rights cases for adequate attorneys' fee awards. On the other hand, there is nothing in the legislative history of § 1988 which even remotely suggests that the treatment of out-of-pocket costs should in any way change as a result of the enactment of § 1988. While we sympathize with Appellees'

rights of its inmates. 349 F. Supp. 881 (N.D. Miss. 1972). We affirmed the District Court. 501 F. 2d 1291 (5th Cir. 1974). In 1973, the District Court awarded attorneys' fees and costs, and we affirmed. 489 F. 2d 298 (5th Cir. 1973). Two Supreme Court cases, ***Edelman v. Jordan***, 415 U. S. 651, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974), and ***Alyeska Pipeline Service Co. v. Wilderness Society, supra,*** led this Court (sitting en banc) to vacate and remand for reconsideration of attorneys' fees in light of these cases. 522 F. 2d 81 (5th Cir. 1975). The District Court reassessed attorneys' fees, 70 F. R. D. 341 (N. D. Miss. 1976), and this Court affirmed the judgments (but reversed the denial of attorneys' fees for appellate proceedings and remanded on that question). 559 F. 2d 244 (5th Cir. 1977). In the 1977 Fifth Circuit case, we remarked: "This is, we hope, the last appearance of this lengthy litigation challenging prison conditions in the Mississippi State Penitentiary." 559 F. 2d at 241.

But the last appearance it was not. The defendants tried one last desperate effort: they refused to pay over the attorneys' fees, raising Eleventh Amendment arguments that, as Part I points out, are so clearly meritless as to be frivolous. Yet, recognizing that they were bound to lose on those arguments, the defendants also challenged the awarding of interest on attorneys' fees and out of pocket costs. By Part II, the Court now rejects the argument that interest on attorneys' fees was

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17/ Continued

claim for interest on costs, we believe that Congress must provide at least some indication of its intent to abrogate the traditional rule against awarding interest on out-of-pocket costs, or at least express a strong and clear intent that costs, like attorneys' fees, must be liberally awarded to ensure effective enforcement of the civil rights laws.

was not proper.18/

And we once again express our hope that with this opinion, 19/ the long history of this litigation involving conditions at the Mississippi State Penitentiary has come to an end.

AFFIRMED IN PART; REVERSED IN PART.

JAMES C. HILL, Circuit Judge, dissenting in part:

There is no doubt that the equitable considerations weigh overwhelmingly in favor of the plaintiffs and their attorneys. The obstinance of the defendants has resulted in the two awards, one 7 years old, remaining unpaid to date. The bulk of the fees awarded reflect rates for attorneys' services prevailing in 1973. Inflation has diminished drastically the value of the awards. If the judgment had been paid promptly, the attorneys would have had the use of the money since 1973 and presumably could have earned a significant amount of interest on the money since that time. The same holds true for the substantial out-of-pocket costs which have been incurred since the start of this litigation more than 9 years ago. Defendants, on the other hand, get a windfall. They have been unrestricted in their use of the money. Even assuming earnings of only 5% per annum, they could have by now recovered a substantial portion of the amount they ultimately will have to pay. Their obstinance has indeed been profitable.

18/ Obviously attorneys' fees (to be fixed by the District Court on remand) are allowable for successfully resisting this appeal on all but the issue of interest on costs.

19/ Judge Hill, of course, continued in his view that en banc court action is required.

I wholeheartedly join with the majority in the feeling that the law ought to permit these plaintiffs to recover interest on the attorneys' fees awarded so long ago and since stubbornly withheld from them by these defendants. Nevertheless, I must dissent from the holding that attorneys' fees, although a part of costs, bear interest. The decision of a panel of this Court in *Carpa Inc. v. Ward Foods, Inc.*, 567 F. 2d 1316 (5th Cir. 1978) is, in my view, dispositive of the issue. As such, the majority's holding flies in the face of the doctrine of stare decisis represented here by the rule that one panel of this Court must abide the decision of a prior panel. This abrupt departure comes at a most inappropriate time in our history.

Although I am of the opinion that *Carpa* prevents the awarding of interest on out-of-pocket expenses, I must dissent from the majority's holding disallowing interest on those costs. The majority's partial recognition of *Carpa* to deny interest on money actually paid out long ago cannot be made to dove tail with its having kicked off the *Carpa* traces as to attorneys' fees.

I. *Attorneys' Fees*

Although several courts have either expressly or impliedly approved the general proposition that interest on fee awards is permissible, see *City of Detroit v. Grinnell Corp.*, 575 F. 2d 1009, 1010 (2d Cir. 1978); *Perkins v. Standard Oil*, 487 F. 2d 672 (9th Cir. 1973); *Holly v. Chasen* No. 75-2116 (D. D. C. Feb. 2, 1979); *McPherson v. School District No. 186*, 465 F. Supp. 749, 765 (D. Ill. 1978); *Cleverly v. Western Electric Co.* 450 F. Supp. 507, 512 (W. D. Mo. 1978), *aff'd*, 594 F. 2d 638 (8th Cir. 1979), a panel of this Court recently came to the contrary conclusion. *Carpa* was a treble-damage action brought under the antitrust laws. The plaintiffs were awarded attorneys' fees plus 6% interest. The court framed the issue before it as follows: "whether the district court may award interest on attorneys' fees when the fees are treated as costs." 567 F. 2d at 1321. In reversing the award of interest, the panel relied

heavily on the fact that the statutory provision authorizing fee awards, 15 U. S. C. A. § 15, categorizes fees as part of costs. 1/ *Id.* at 1322. No authority for awarding interest on costs was found, 2/ there was nothing in the language of the statute to indicate that interest on costs was recoverable, and the legislative history of the statute was silent on the question. *Id.*

The statute under consideration in this case, the Civil Rights Attorneys' fees Awards Act, also treats attorneys' fees as part of costs: "[T]he court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." 42 U. S. C. A. § 1988. As in *Carpa*, the legislative history of the Act is silent on the question of interest, and there is nothing in the language of the statute to indicate that Congress intended that attorneys' fees bear interest. 3/

The majority criticizes this reading and application of *Carpa* as "[relying] ***exclusively*** on the definition of attorneys' fees as part of costs." At 1273, ***supra.*** In the majority's view, *Carpa* only disposed of the interest issue in the context of the antitrust fee award provision. Having so freed itself of the obli-

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1/ 15 U. S. C. A. § 15 provides for the recovery of "the cost of suit, including a reasonable attorney's fee."

2/ The one case which had been decided prior to *Carpa*, *Perkins v. Standard Oil*, 487 F. 2d 672 (9th Cir. 1973), was rejected by the Panel because it was "based on an erroneous view of the law." *Carpa, Inc. v. Ward Foods, Inc.*, 567 F. 2d 1316, 1322 (5th Cir. 1978).

3/ One district court case in which interest was allowed on an award of fees is cited in the Senate Report accompanying the Act. S. Rep. No. 94-1011, 94th Cong., 2d Sess. 6 (1976). That case, however, was cited only as an example of the proper way of calculating the amount of the award. *Id.* (citing *Davis v. County of Los Angeles*, 8 E. P. D. ¶944 (C. D. Cal. 1974)).

gation to apply *Carpa* to this case, the majority porceeds to analyze the Act's fee provision to determine whether the relevant policy considerations militate in favor of allowing interest to be awarded. In this vein, three significant characteristics of civil rights cases are noted. First, civil rights claimants often do not have the money to hire an attorney. Second, unlike the antitrust laws, the civil rights statutes do not provide for treble damage awards from which a plaintiff might draw on to help compensate his attorney. Third, since the relief in civil rights cases frequently is injunctive only, normally there is no fund from which to supplement court-awarded fees. With these observations I have no argument. It is clear that these factors led Congress to the conclusion that a fee award provision was necessary to ensure that private citizens be able to obtain counsel to assist them in seeking redress for violations of their civil rights. Unfortunately, the question before this panel is not whether attorneys' fees should be awarded; rather, the question is whether the fees that were awarded should bear interest. I have little doubt that Congress would have authorized interest had they thought of it. But, as the majority concedes, Congress never considered the issue. Since Congress did not manifest an intent one way or the other, the issue is one for the judiciary to decide.

As in any other case where we are not compelled to a result by the action or inaction of Congress, our first duty is to determine whether we are writing on a clean slate. My disagreement with the majority stems from my belief that we are not writing on a clean slate. While I agree that the result reached by the majority is a desirable one, I do not feel that we are free to reach it.

I begin with the proposition that attorneys' fees although different than other costs, are nevertheless a part of the costs of a lawsuit. A reading of the majority opinions in *Hutto v. Finney*, 437 U. S. 678, 695-98, 98 S. Ct. 2565, 2576-77, 57 L. Ed. 2d 522 (1978) and *Alyeska Pipeline Co. v. Wilderness Society*, 421 U. S. 240, 247-57, 95 S. Ct. 1612, 1616-21, 44

L. Ed. 2d 141 (1975), leaves one with the unmistakable impression that attorneys' fees are, and have long been considered, a part of litigation costs. Thus, the majority's belief that Congress categorized fees as part of costs to ensure that the states would not be insulated by the Eleventh Amendment is irrelevant. Whether Congress was or was not correct in the belief that the terminology used would be dispositive of the Eleventh Amendment question does alter the fact that attorneys' fees are part of costs.

The next question-whether costs bear interest-was, as I have already stated, the question before the *Carpa* panel. The basis of that panel's holding is clear from its citation of *Duffer v. American Home Assurance Co.*, 512 F. 2d 793 (5th Cir. 1973). *Duffer* was a diversity case in which the plaintiff was awarded attorneys' fees under the authority of a Texas insurance statute. The statute stated that "attorney's fee shall be taxed as a part of the costs in the case." *Id.* at 800. The district court included the fee award in the damage judgment and assessed interest on the whole amount. This Court held that the fees should have been taxed separately and no interest awarded thereon. It is clear that the decision was based on the fact that attorneys' fees are part of costs and, as such, do not bear interest. At least that is the way the *Carpa* panel read *Duffer*:

> [I]t is somewhat instructive to note that faced with a statutory language similar to 15 U.S.C. §15, and without any controlling precedent to bind it, the court held that ***attorneys' fees are an item of costs and as such do not bear interest.***

567 F. 2d at 1322 (emphasis added).

In my view, the four opinions discussed above preclude this three-judge panel from deciding the desirability of allowing interest on attorneys' fees awarded under the Act.

II. *Out-of-Pocket Costs*

The question whether interest should be awarded on out-of-pocket costs is disposed of by the majority all too easily. The footnote accompanying the one-sentence textural discussion of out-of-pocket expenses explains that "firmly established in our jurispurdence" is the principle that such costs do not bear interest. At 1279, ***supra.*** The three cases cited by the majority-***Carpa. Duffer,*** and ***Jesko v. American-First Title & Trust Co.,*** 603 F. 2d 815, 820 n. 11 (10th Cir. 1979)-simply do not support that statement. There is nothing in any of those opinions to the effect that some costs are interest bearing while others are not.

Judge Brown's eloquent presentation of the Act's legislative history demonstrates that Congress perceived a great need to authorize awards of attorneys' fees. Contrary to the apparent assumption of the majority, I do not believe that anything in the legislative history discloses that Congress was only luke warm in its decision that a prevailing plaintiff also should be awarded his out-of-pocket costs. There is nothing to suggest that Congress considered attorneys' fees more important or less important than other litigation expenses.

In my view, there is more reason to allow interest on out-of-pocket expenses than on attorneys' fees. The label "out-of-pocket" is most revealing. Such costs include filing fees, court reporter fees and the like. Unlike attorneys' fees, these are bills that had to be paid years ago to keep the lawsuit alive. Were I not of the opinion that ***Carpa*** prevents us from allowing interest on any part of costs, I would not hesitate to hold that these plaintiffs should have interest on their out-of-pocket costs.

III. *Stare Decisis*

The respective positions of the three judges on this panel can

be stated as follows:

The Majority

"I cannot bear to be told when an argument has been addressed to me by which I am not convinced, that there is a case decided which I am bound to follow." *In re Holmes*, 60 C. D. 269 (1890).

The Dissent

"My duty is, as a Judge, to be governed by fixed rules and former precedents." *Brownlow v. Egerton*, 23 L. J. Rep. part 5, ch. 364 (1854).

The Panel

"I have often thought since that there is sound sense in what was once said by the late Lord C. J. Eyre, that the sooner a bad precedent was gotten rid of, the better." *King v. Stone*, 1 East 648 n. (a) (1801).

Were I writing on a clean slate, I would be hard pressed to hold that costs do not bear interest. Outside this Circuit, there is no authority supporting such a holding. As noted above, most federal courts have found no barrier to awarding interest on costs. Nonetheless, in our Circuit one panel cannot overrule a prior panel decision, and the question before this panel is controlled by *Carpa*. *See United States v. Lewis*, 475 F. 2d 571, 574 (5th Cir. 1973).4/

4/ Defendants argue that even if we are not bound by *Carpa* we are still precluded, by *Rainey v. Jackson State College*, 591 F. 2d 1002 (5th Cir. 1979), from affirming the award of interest. The cited decision was an order of a panel of this Court denying a motion for post-judgment interest on an award of attorneys' fees. Because the order was not accom-

The majority's departure from the doctrine of ***stare decisis*** presents a grave threat to the orderly administration of justice in this Circuit at a time in history when adherence is of particular and vital importance. This court has been restructured in a fashion unprecedented in the history of the judiciary. With the implementation of the Omnibus Judgeship Bill of 1978, Pub. L. 95-486, 92 Stat. 1629 (1978), this Court is now made up of twenty-six active judges and ten senior judges, most of whom sit regularly on our panels. Whether or not such a body can fairly and efficiently articulate, in one voice, the law affecting nearly 50 million people remains to be seen. I submit that our success may in large part depend on our adherence to the doctrine of ***stare decisis.*** If we give only lip service to the rule that one panel is bound by prior panel decisions, we run the risk of transforming what has heretofore been an orderly institution into an inconsistent, unpredictable body, made up of three-judge panels that resemble waterbugs chasing each other around and around the suface of a summer pond.

The issue of interest on costs should be presented to the entire Court on a proposal that it be considered ***en banc***. Should a majority of the Court conclude that *Carpa* was an unwise decision, these long persevering plaintiffs can receive a full loaf instead of the half loaf given them by the majority. More importantly, it would give the full Court the opportunity to establish a general rule for the scores of federal statutes that authorize awards of attorneys' fees and our-of-pocket expenses.

4/ Continued
panied by a written opinion, it is not clear that *Rainey* alone would preclude us from affirming the award of interest. Even if the panel in *Rainey* did base its decision on *Carpa*, an *en banc* decision declaring that costs bear interest would eliminate any precedential value that *Rainey* now carries.

If we approach this problem on a case-by-case basis, we can expect to be deluged with litigation over the more than 75 statutes listed in footnote 14 of the majority opinion. *Cf. Arkansas v. Sanders*, 442 U. S. 753, 99 S. Ct. 2586, 2595, 61 L. Ed. 2d 235 (1979) (Blackmun, J. dissenting).

If it be the will of the Court, the correct rule can be announced *en banc*. Of course, if a majority of the Court does not wish the *Carpa* rule reconsidered, then it should not be, for it is the Court's decision to make. It would be a gross departure from good judicial practice for a three-judge panel to alter an established rule merely because its members fear that the full court would not agree with its views.

West Number System

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 1215, 1235 - September Term, 1979
(Argued April 28, 1980 — Decided June 4, 1980)

Docket Nos. 80-7289, 80-7295

NEW YORK STATE ASSOCIATION FOR
RETARDED CHILDRED, INC. et al.

and

PATRICIA PARISI, et al.,
Plaintiffs-Appellees,

against

HUGH L. CAREY, individually and as Governor of the State of New York, and EDWARD V. REGAN, individually and as Comptroller of the State of New York, et al.,
Defendants-Appellants

Before:

LUMBARD, VAN GRAAFEILAND and KEARSE,
Circuit Judges.

3323

LUMBARD, Circuit Judge:

Hugh L. Carey and Edward V. Regan, the Governor and Comptroller of the State of New York respectively, appeal from two orders entered in the Eastern District by Judge Bartels on April 10, 1980. One order joined the Comptroller as a party, the other adjudged the Governor and the Comptroller to be in contempt if funding was not provided for the Willowbrook Review Panel by April 15th. We granted a stay of the contempt order pending disposition of this appeal.

Although the Governor was a party to the Consent Judgment of April 30, 1975, which was designed to improve conditions for a class of 5200 mentally retarded residents at the Willowbrook Developmental Center on Staten Island, in part through the establishment of a Review Panel, we conclude that Governor Carey has complied with the Consent Judgment by taking all steps within his lawful authority to secure funding for the Panel. Furthermore, we conclude that since the Consent Judgment clearly states that the Governor's efforts are to be made within the framework of the state constitution and laws, there is no justification for requiring action in violation of New York law. Accordingly, the order is reversed.

This action was brought in 1972 by plaintiff and other similar organizations and the parents of retarded residents on behalf of all Willowbrook residents against the Governor and numerous state agencies and officials charged with operating Willowbrook to improve conditions which were alleged to violate the constitutional rights of the residents. After extended hearings, the parties agreed to a Consent Judgment signed by Judge Orrin G. Judd on April 30, 1975, which provided in part that "Without admission and prior to final findings of fact and conclusions of law" the parties agreed to "additional steps, standards and procedures necessary to secure the constitutional right to protection from harm for Willowbrook's

residents" in order to ensure that the procedures set out in greater detail in the judgment and accompanying 29 page appendix would be carried out. The judgment provided for the creation of a seven member Review Panel.

Paragraph 2 of the Consent Judgment provided:

"Within their lawful authority, including the State constitution and applicable State laws, and subject to any legislative approval that may be required, defendants are hereby ordered and enjoined to take all actions necessary to secure implementation of the steps, standards and procedures contained in this judgment and in Appendix 'A' hereto . . . Defendants shall take all steps necessary to ensure the full and timely financing of this judgment, including, if necessary, submission of appropriate budget requests to the legislature." It is conceded that the Governor has done all in his power to make specific budget requests to the Legislature to obtain the appropriation of $342,000 to finance the operation of the Review Panel and its staff. The funds requested for a Review Panel constituted a specific line item under the $747,000 requested for "Court-Ordered Program". Despite the Governor's request the Legislature specifically deleted the entire $342,000 item. The Senate Finance Committee and the Assembly Ways and Means Committe stated:

> The Fiscal Committees support the efforts of the Executive to meet the community placement mandates of the Willowbrook Consent Decree. Funding is decreased by ($348,000) to reflect denial of funding for the Willowbrook Review Panel and to return reimbursement rates for other advisory groups to 1979-80 levels.

Apparently the Legislature disapproved of the high per diem rate to be paid to consultants on the Review Panel. The plaintiffs then petitioned the district court to order the restoration

of the funds and Judge Bartels directed the Governor and the Controller (about to be joined as a party) to show cause on April 7 why they should not be ordered to pay the Review Panel's expenses or be held in contempt by failure to do so. After hearing argument, Judge Bartel ordered that the Comptroller be joined as a party and that he and the Governor be adjudged in contempt if funding was not provided by April 15. Meanwhile, on April 14, the Governor submitted a supplemental appropriation bill, upon which the Legislature has not yet acted, to restore the Review Panel's funds.

Judge Bartels acknowledged at the April 7 show-cause hearing that Governor Carey has acted entirely in good faith in this dispute. Nevertheless, Judge Bartels stated in his April 10 Memorandum Decision and Order, "[W]e remain unconvinced that the Governor, together with the extensive resources, financial and otherwise, at his disposal, has done all within his powers, through formal and informal channels, to see that funding be either restored or replaced." Judge Bartels then suggested that the Governor, in order to provide at least temporary funding for the Panel, could draw funds from any one of five appropriations which, in Judge Bartels' view, could be considered to comprehend such a use, or could interchange a portion of appropriated funds pursuant to Sec. 51 of the New York Finance Law. Accordingly, on the ground that funds from which the Review Panel could be paid were at the appellants' disposal, Judge Bartels ordered that Governor Carey and Comptroller Regan be held in contempt if funding was not provided for the review Panel by April 15. We reverse.

The appellants can obey Judge Bartels' order and thereby avoid the sanctions attending contempt, only by violating the Constitution and laws of the State of New York. Article VII, Section 7 of the New York State Constitution prescribes:

> No money shall ever be paid out of the state treasury or any of its funds, or any of the funds under its man-

agement, except in pursuance of an appropriation by law; . . . and every such law making a new appropriation or continuing or reviving an appropriation shall distinctly specify the sum appropriated, and the object or purpose to which it is to be applied; and it shall not be sufficient for such law to refer to any other law to fix such sum.

New York case law states clearly that this provision "prohibits funds from being expended in excess of the amounts appropriated and for purposes other than those specified in the Appropriations Bill." *County of Oneida v. Berle*, 91 Misc. 2d 694, 398 N. Y. S. 2d 600, 603 (Sup. Ct. 1977), *aff'd* _____ N. Y. 2d _____ *(N.* Y. Court of Appeals, *per curiam*, April 1, 1980). In affirming the Supreme Court in *Berle*, the New York Court of Appeals reiterated, "However laudable its goals, the executive branch may not override enactments which have emerged from the lawmaking process. It is required to implement policy declarations of the Legislature, unless vetoed or judicially invalidated." _____ N. Y. 2d _____ (Slip op. at 7 (N. Y. Ct. App., April 1, 1980)). Thus, under New York law, Governor Carey can legally expend funds for the Review Panel only if the Legislature has appropriated funds for that purpose. The Legislature did not appropriate funds for the Review Panel; on the contrary, it deleted the proposed line item for the Review Panel and it expressly stated its intention to deny such funding in the Report of the Senate Finance Committee and the Assembly Ways and Means Committee. 1/

1/ Appellees argue that statements in the Report of the Senate Finance Committee and the Assembly Ways and Means Committee do not amount to binding statements of legislative intent under *New York Public Interest Research Group, Inc. v. Carey*, 55 A. D. 2d 274, 390 N. Y. S. 2d 236 (3d Dept. 1976), *app. dism. as moot*, 41 N. Y. 2d 1072, 396 N. Y. S. 2d 185 (1977), and that Governor Carey can therefore legally expend funds for the Review Panel. However, even assuming that the report in the case before us is the same type of report as that in *New York Public Interest*

The Legislature's denial also bars Governor Carey, notwithstanding the suggestions of Judge Bartels and appellees, from drawing funds for the Review Panel from other appropriations or pursuant to his authority under Section 51 of the New York Finance Law to interchange up to 5% of different appropriations. Section 43 of the New York State Finance Law states:

> Money appropriated for a specific purpose shall not be used for any other purpose, and the Comptroller shall not draw a warrant for the payment of any sum appropriated, unless it clearly appears from the detailed statement presented to him by the person demanding the same as required by this chapter, that the purposes for which such money is demanded are those for which it was appropriated.

1/ Continued

Research Group, where taxpayers sought to restrain the Governor from expending funds actually appropriated, we do not find appellee's argument persuasive. In that case, the report recommended to the Legislature, prior to the budget's enactment, certain reductions in the proposed appropriations and, in conjunction therewith, that certain specific job titles be abolished. In enacting the budget, the Legislature reduced proposed appropriations and specifically abolished jobs in some instances, and reduced appropriations but did not specifically abolish jobs in other instances. The Appellate Division held that the Legislature's specific abolition of some jobs and its silence as to other jobs "is sufficient to destroy reliance upon the Report as establishing the intent to abolish certain positions where the legislation is silent thereto." *Id.* at 237. In the case before us, however, the Legislature's deletion of the line item for the Review Panel wholly accords with the statement of intent in the Report. There is no reason, therefore, to doubt that the Report's statements represent the Legislature's intent. Moreover, Governor Carey could not draw funds for the Review Panel even absent the Report, for he could not do so in compliance with Section 43 of the New York Finance Law, as explained *infra*.

In light of the Legislature's denial of funding for the Review Panel, Governor Carey cannot present to Comptroller Regan as Section 43 requires, a statement clearly indicating that "the purposes for which such money is demanded are those for which it is appropriated." Section 51 does not avail Governor Carey because it only authorizes an interchange between, on the one hand, "any item or items within a program or purpose" and, on the other, "any item or items within the same program or purpose, or with other items . . . contained in the comptroller's classification." There being no item for the Review Panel in enacted budget, Governor Carey cannot interchange funds between the Review Panel and some item that the Legislature did enact.

Appellees argue that Judge Bartels can order Governor Carey to expend funds for the Review Panel, or face contempt, even if New York law forbids Governor Carey from expending funds for that purpose. Appellees rest this argument upon cases which hold that state action, or inaction, cannot defeat a constitutional or federally created right, *See, e. g., State of Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 444 U. S. _____ (1979); *North Carolina Board of Education v. Swann*, 402 U. S. 43 (1971). The cases appellees cite did not, however, involve the remedy ordered in this case: That a state official expend state funds for a purpose expressly disallowed by the state legislature. We have previously held, and repeat here, that a federal district court ought not to put itself "in the difficult position of trying to enforce a direct order . . . to raise and allocate large sums of money, . . . steps traditionally left to appropriate executive and legislative bodies responsible to the voters." *Rhem v. Malcolm*, 507 F. 2d 333, 341 (2d Cir. 1974). In the face of constitutional violations at a state institution, a federal court cna order the state either to take the steps necessary to rectify the violations or to close the institution. Thus, a state cannot avoid the obligation of correcting the constitutional violations of its institutions simply by pleading fiscal inability. *Dimarzo*

v. Cahill, 575 F. 2d 16 (1st Cir. 1978); *Welsch v. Likins*, 550 1122 (8th Cir. 1977); *Rhem, supra*. But that remedy leaves the question of the expenditure of state funds in the hands of citizens of the state, not in the hands of federal judges. Furthermore, the broad remedial powers invoked by appellees are predicated upon a finding of a constitutional violation. Assuming that the conditions at Willowbrook violated the Constitution in 1975 when the Consent Judgment was filed, 2/ and accordingly that the federal court would have had remedial power to order the establishment of the Review Panel upon a finding of unconstitutionality, 3/ there is no basis for additionally assuming that, by itself, the state's refusal to fund the Review Panel, which was established by the Consent judgment, violates the Constitution.

The wording of the Consent Judgment envisioned the practical and political difficulties which the Governor necessarily faced regarding the appropriation of funds to maintain Willowbrook, and provide for the Review Panel, in accordance with provisions of the Consent Judgment, Thus, the Governor consented only to act within his "lawful authority, including the State Constitution and applicable State laws, and subject to any legislative approval that may be required."

Under the Consent Judgment the court cannot compel the

2/ Appellants do not concede that the conditions of Willowbrook Developmental Center violate the Constitution today.

3/ Nothing in this opinion should be construed to agree with the view that a federal court properly exercises its function when it takes upon itself the supervision of a state institution like Willowbrook Development Center. From the record before us in *New York Association for Retarded Children v. Carey*, 596 F. 2d 27, 33 (2d Cir.), *cert denied*, _____ U. S. _____ (1979), and in this proceeding, it appears that the district court has, since 1975, devoted considerable attention to the details of the operation of the Review Panel and the supervision of Willowbrook.

Governor to act unlawfully. Those organizations and citizens who are properly concerned with the supervision of the conditions at Willowbrook must seek to convince their representatives in the New York State Senate and Assembly, who control the purse-strings and determine the priorities for the expenditure of State money, that funds for the Review Panel should be provided.

Reversed.

KEARSE, *Circuit Judge* (concurring) :

I concur in the result, but I find it unnecessary, on the facts of this case, to decide whether a federal court ought to be in a " 'position of trying to enforce a direct order . . . to raise and allocate large sums of money . . . .' " (Majority opinion 6.) And, with all due respect, I do not agree with the implications of the majority opinion that the only alternatives available to the district court to remedy constitutional violations at a state institution are to "order the state either to take the steps necessary to rectify the violations or to close the institution." *(Id.)* 1/ I believe that the order of contempt

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1/ The majority cites and endorses *Rhem v. Malcolm*, 507 F. 2d 333, 341 (2d Cir. 1974), as holding that a district court "ought not" to put itself in a position of trying to enforce a direct order requiring the expenditure of state funds. To the extent that the majority intends this statement, together with the sentence that follows, to reflect a limitation of the court's power, I do not believe *Rhem* should be read so broadly. In *Rhem* this Court opted for a remedy which it described as having "the crucial *practical advantage* . . . of not putting the judge in the difficult position of trying to enforce a direct order to the City to raise and allocate large sums of money . . ." 507 F. 2d at 341 (emphasis added). In a footnote the Court indicated that special circumstances might warrant such an order:

should be reversed simply because it was not demonstrated that the Consent Judgment was violated.

The defendants who were parties to the Consent Judgment included Governor Carey and other State officials but did not include the State Legislature. Paragraph 2 of the Consent Judgment expressly stated that the defendants would take the actions required by the Judgment, which included the funding of the Review Panel, 2/ within the framework of the State's constitution and laws, and subject to any legislative approval that might be required. Paragraph 2 concluded with

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1/ Continued

> [S]ince prohibiting use of the Tombs to incarcerate detainees is a viable alternative, we do not have a situation where the unconstitutionally-administered governmental function must be kept operating in any event. In such a case, a court might have no choice but to order an expensive, burdensome or administratively inconvenient remedy.

507 F. 2d at n. 19.

There is little doubt that a federal court can issue a remedial order which as a practical matter requires expenditures by the state. *See Millikin v. Bradley*, 433 U. S. 267, 289 (1977) (upholding order requiring state to bear expenses since federal court can "enjoin state officials to conform their conduct to requirements of federal law, notwithstanding a direct and substantial impact on the state treasury"). The courts understandably have been reluctant to cause "needless direct confrontations" with state legislatures, *Welsch v. Likins*, 550 F. 2d 1122, 1132 (8th Cir. 1977), and in some cases have merely expressed the hope that state legislatures will cooperate once their constitutional duty is made clear, *See, e. g., N. Y. S. Ass'n for Retarded Children v. Carey*, 596 F. 2d 27, 38-39 (2d Cir. 1979); *Welsch v. Likins, supra*, 550 F. 2d at 1132.

2/ Paragraph 7(c) of the Consent Judgment provides, in part: "Review Panel members and Review Panel staff shall receive appropriate compensation from defendants, on a monthly basis, and shall promptly be reimbursed by defendants for reasonable out of pocket expenses incurred in performing the duties of the Review Panel."

the requirement that "Defendants should take all steps necessary to ensure full and timely financing of this Judgment, including, if necessary, submission of appropriate budget requests to the legislature."

The district court found that the Governor had made a good faith effort to ensure financing for the Review Panel, through the submission of a budget request which expressly sought $342,300 for "services and expenses of the Willowbrook Review Panel. including compensation for panel members." 3/ The legislature deleted this line from the proposed budget and enacted the budget without providing funds for the Review Panel. The legislature's Fiscal Committees' Report on the budget stated as follows:

> The Fiscal Committees support the efforts of the Executive to meet the community placement mandates of the Willowbrook Consent Decree. Funding is decreased by ($348,000) *to reflect denial of funding for the Willowbrook Review Panel* and to return reimbursement rates for other advisory groups to 1979-80 levels.

(Emphasis added.) Thus the Governor's request for Review Panel funds was denied by the legislature.

The district court was nevertheless critical of the Governor for not funding the Review Panel out of moneys appropriated

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3/ Prior to entry of the contempt order below, the Governor had submitted to the legislature a supplemental appropriation bill, with a "message of necessity," to restore funds for the Review Panel. The legislature had not acted upon this request by the date of oral argument and we are unaware of any action since that time.

elsewhere in the budget. Yet, as pointed out by the majority, New York law forbids the Governor's expenditure of funds for purposes specifically eliminated by the legislature. In *New York Public Interest Research Group, Inc. v. Carey*, 86 Misc. 2d 329, 383 N. Y. S. 2d 197 (Sup. Ct.), *Aff'd* 55 A. D. 2d 274, 390 N. Y. S. 2d 236 (3d Dep't 1976), *app. dism. as moot*, 41 N. Y. 2d 1072, 396 N. Y. 2d 185 (1977), the New York court held that expenditures could be made in spite of disapproval expressed in a committee report so long as they were not for specific items that had been deleted from the budget; but the court observed that if a specific deletion had been made, no expenditure could lawfully follow:

> Prior to such enactment these committees reviewed the requests of difference executive departments and in some instances conducted hearings and made certain amendments to the Budget Bill. *To the extent that the Bill itself specifically eliminated certain positions and programs there is no dispute. Those positions and programs were effectively eliminated by appropriate legislative action and it is agreed that no expenditures can be made for any such position or program.*

86 Misc. 2d at 330, 383 N. Y. S. 2d at 198 (emphasis added). Appellees would have us find that the legislature did not in fact intend to deny funding for the Review Panel, on the strength of a general statement in the preamble to the budget that the budget "reflects . . . the State's continued commitment to comply with the requirements of the Consent Judgment." I do not believe we are entitled to infer from this general statement an intention that Review Panel funding be continued, 4/ in light of the action of the legislature in deleting the Review Panel line of the proposed budget and the express

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4/ If the legislature is truly committed to compliance with the entire Consent Judgment, and not just so much of the Judgment as it chose

statement that the deletion was to "reflect denial of such funding. Consequently I conclude that the Governor has done all within his lawful power to secure funding for the Review Panel.

Appellees argue that the contempt order nevertheless should be affirmed because state law cannot be allowed to thwart the effectuation of federally-mandated remedial measures. 5/ While I would agree with this general proposition within appropriate limits, I do not consider it applicable to the present circumstances. The Consent Judgment clearly does not impose on the Governor any obligation to take action that is not within his "lawful authority," and the express recognition of that Judgment that funding may require "requests" to the legislature recognizes implicitly that such a request (to a body not party to the lawsuit) may be denied. Where the parties have chosen to condition defendants' performance of remedial steps, however important they may be, on state legislative approval, there is no justification for invalidating the withholding of that approval.

The importance of the Review Panel in the remedial scheme is clear from the Consent Judgment and was emphasized by this

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4/ Continued

to budget for, perhaps it will act favorably upon the supplemental appropriation request described in note 3 *supra*.

5/ *Cf. State of Washington v. Washington State Commercial Passenger* Fishing Vessel Ass'n, 443 U. S. 658, 695 (1979) (federal court can order state agency to prepare rules implementing federal court's order even if state law withholds from agency power to do so); *North Carolina State Board of Education v. Swann*, 402 U. S. 43, 45 (1971) (invalidation of state anti-busing statute since statute "would inescapably operate to obstruct the remedies granted by the District Court . . . ").

Court in *New York State Ass'n for Retarded Children v. Carey*, 596 F. 2d 27 (2d Cir. 1979). The Panel is given responsibility for monitoring compliance, reporting to the court and recommending resolutions to disputes. Denial of funding for the Panel may result in a halt to all efforts toward implementation - even efforts that require no special legislative approval or funding - unless an alternative monitoring technique is devised. Since the Panel's responsibilities included dispute-resolution, the absence of the Panel may also result in more judicial involvement in implementing the Judgment.

District courts enjoy broad discretion in designing and enforcing equitable remedies, *see Hart v. Community School Board*, 512 F. 2d 37, 55 (2d Cir. 1975); *Bridgeport Guardians, Inc. v. Bridgeport Civil Service Comm'n*, 482 F. 2d 1333, 1340 2d Cir. 1973), and have employed a variety of techniques for such purposes, *see* Special Project, *The Remedial Process in Institutional Reform Litigation*, 78 Colum. L. Rev. 784, 821-37, 858-70 (1978). Paragraph 9 of the Consent Judgment provides for retention of jurisdiction in the district court "for the purpose of enabling any party to apply at any time for . . . such further orders as may be necessary or appropriate for the construction of, implementation of, or enforcement of compliance with this judgment or any of the provisions thereof." In view of the Governor's avowed commitment to implementation of the Consent Judgment, the district court and the parties may well be able to arrive at an alternative method for monitoring compliance and resolving disputes. It is clear from the terms of the Consent Judgment, however, that the relief appellees seek here-continuation of state funding for the Review Panel-cannot be obtained in the face or express legislative disapproval.

U. S. Constitution, Tenth Amendment

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

U. S. Constitution, Eleventh Amendment

"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

42 U. S. C. Section 1988 (1976)

Proceedings in vindication of civil rights

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment of the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion , may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of

the costs.

As amended Pub. L. 94-559, Section 2, Oct. 19, 1976, 90 Stat. 2641.

Federal Rules of Civil Procedure "Rule 69. Execution

(a) In General. Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable. In aid of the judgment or execution, the judgment creditor or his successor in interest when that interest appears of record, may examine any person, including the judgment debtor, in the manner provided in these rules for taking depositions or in the manner provided by the practice of the state in which the district court is held."

Federal Rules of Civil Procedure "Rule 70. Judgment for Specific Acts, Vesting Title

If a judgment directs a party to execute a conveyance of land or to deliver deeds or other documents or to perform any other specific act and the party fails to comply within the time specified, the court may direct the act to be done at the cost of the disobedient party by some other person appointed by the court and the act when so done has like effect as if done by the party. On application of the party entitled to performance, the clerk shall issue a writ of attachment or sequestration against the property of the disobedient party to compel obedience to the judgment. The court may also in proper cases adjudge the party in contempt. If real or personal property is within the district, the court in lieu of directing a conveyance therof may enter a judgment divesting the title of any party and vesting it in others and such judgment has the effect

of a conveyance executed in due form of law. When any order or judgment is for the delivery of possession, the party in whose favor it is entered is entitled to a writ of execution or assistance upon application to the clerk."

1974 Louisiana Constitution, Art. VII, Sec. 10(a)

"Appropriations. Except as otherwise provided by this constitution, money shall be drawn from the state treasury only pursuant to an appropriation made in accordance with law."

1974 Louisiana Constitution, Art. XII, Sec. 10(c)

"Procedure; Judgments. The legislature shall provide a procedure for suits against the state, a state agency, or a political subdivision. It shall provide for the effect of a judgment, but no public property or public funds shall be subject to seizure. No judgment against the state, a state agency, or a political subdivision shall be exigible, payable, or paid except from funds appropriated therefor by the legislature or by the political subdivision against which judgment is rendered."

LEGISLATIVE CALENDAR

HOUSE BILLS

THIRD REGULAR SESSION, 1977

HOUSE BILL No. 1621
By Mr. Bella:

AN ACT

To appropriate the sum of Two Hundred Four Thousand Nine Hundred and Sixteen and 88/100 ($204,916.88) Dollars, plus legal interest from date of judicial demand, until paid and costs of court which the state may be legally liable, out of the General Funds of the State of Louisiana to be used to pay the final judgment in the suit entitled "Gary W., et al vs. William Stewart, et al," bearing Number 74-2412 on the docket of the United States District Court for the Eastern District of Louisiana.

HOUSE

May 3
Read by title. p. 99

May 3
Introduce by title only.
Read by title.
Return to the Calendar under the rules. p. 86

May 18
Called from the Calendar.
Read by title, amended, and referred to the Committee on Appropriations p. 64

OFFICIAL JOURNAL

OF THE

HOUSE OF REPRESENTATIVES

OF THE

STATE OF LOUISIANA

FIFTH DAY'S PROCEEDINGS

FOURTH
EXTRAORDINARY SESSION OF THE LEGISLATURE
UNDER THE ADOPTION OF THE
CONSTITUTION OF 1974

HOUSE OF REPRESENTATIVES
STATE CAPITOL
STATE OF LOUISIANA

Thursday, August 1, 1977, Baton Rouge, La.

The House was called to order at 9:00 a. m., by Hon. E. L. Henry, Speaker of the House of Representatives.

HOUSE OF
REPRESENTATIVES

OF THE

STATE OF LOUISIANA

EIGHTEENTH DAY'S PROCEEDINGS

Third Regular Session Of The Legislature
Under The Adoption Of The
Constitution of 1974

HOUSE OF REPRESENTATIVES
STATE CAPITOL
STATE OF LOUISIANA

Wednesday, May 18, 1977, Baton Rouge, La.

The House was called to order at 9:00 a. m., by Honorable E. L. Henry, Speaker of the House of Representatives.

PAGE 64 HOUSE

18th Days Proceedings - May 18, 1977

HOUSE BILL NO. 1621
By Mr. Bella:

AN ACT

To Appropriate the sum of Two Hundred Four Thousand Nine Hundred and Sixteen and 88/100 ($204,. 916.88) Dollars, plus legal interest from date of judicial demand, until paid and

costs of court which the state may be legally liable, out of the General Funds of the State of Louisiana to be used to pay the final judgment in the suit entitled "Gary W., et al vs. William Stewart, et al," bearing Number 74-2412 on the docket of the United States District Court for the Eastern District of Louisiana.

Called from the Calendar.

Read by title.

Mr. Bella sent up floor amendment which was read as follows:

HOUSE FLOOR AMENDMENTS

Amendment proposed by Mr. Bella to House Bill No. 1621 by Mr. Bella.

Amend original bill as follows:

AMENDMENT NO. 1

On page 1, line 11, after "Section 1." add the following:

"The sum of Two Hundred Four Thousand Nine Hundred Sixteen and 88/100 ($204,916.88) Dollars, plus legal interest from date of judicial demand, until paid and costs of court for which the state may be legally liable, is hereby appropriated out of the General Fund of the state of Louisiana to be used to pay the final judgment in the suit entitled "Gary W. et al vs. William Stewart, et al.," bearing Number 74-2412 on the docket of the United States District Court for the Eastern District of Louisiana.

Section 2. This Act shall become effective upon signature by the governor, or if not signed by the governor, upon expiration of the time for bills to become law without signature by the governor, as provided by Article III Section 18 of the

Constitution.

Section 3. The judgment provided for in Section 1 hereof shall be deemed to have paid on the effective date of this Act and legal interest shall cease to run as of that date."

On motion of Mr. Bella, the amendment was adopted.

Under the rules the above bill was referred to the Committee on Appropriations.

HOUSE BILL NO. 15
By Mr. Bella:

AN ACT

To appropriate the sum of Two Hundred Four Thousand Nine Hundred and Sixteen and 88/100 (204,916.88) Dollars, plus legal interest from date of judicial demand, until paid and costs of court for which the state may be legally liable, out of the General Fund of the State of Louisiana to be used to pay the final judgment in the suit entitled "Gary W., et al vs. William Stewart, et al," bearing Number 74-2412 on the docket of the United States Court for the Eastern District of Louisiana.

Called from the Calendar.

The Bill was read by title.
Mr. Bella moved the final passage of the Bill.

ROLL CALL

The roll was called with the following result:

YEAS
Total 47

NAYS
Total 48

ABSENT
Total 10

And the Chair declared that the above Bill failed to pass.

Supreme Court, U.S.
FILED
JAN 9 1981
MICHAEL RODAK, JR., CLERK

No. 80-875

IN THE

Supreme Court

OF THE

United States

OCTOBER TERM, 1980

STATE OF LOUISIANA, et al.,
Petitioners,

VS.

GARY W., et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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33

COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether a federal court has authority to enforce against a recalcitrant state agency a valid judgment requiring the payment of court costs and of attorneys' fees under the Civil Rights Attorney's Fees Awards Act of 1976.

PARTIES TO PROCEEDING

The Petition contains a number of errors in its listing of the parties, both in the caption and in the introductory section. (Pet., p. ii). Most significantly, neither the State of Louisiana, its Governor, nor its Health, Social, and Rehabilitation Services Administration (renamed the Louisiana Department of Health and Human Resources) are parties to this case. (*See* p. 2, n.3, *infra.*) The only party-defendant with an interest in the present controversy (and the only defendant who was a party in the court of appeals) is George Fischer, the Secretary of the Louisiana Department of Health and Human Resources, as all of the relief for which review is now being sought was directed against the Secretary in his official capacity.[1] Set forth in the margin is a complete list of the parties to the proceedings on the merits in the district court.[2]

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[1]During the course of this litigation, there have been three Secretaries of the Department of Health and Human Resources: first Dr. William Stewart, then William Cherry, and now, George Fischer.

[2]GARY W., by his mother and next friend, D.S.; JOSEPH G., by his mother and next friend, J.B.; ELIZABETH M., by her mother and next friend, N.C.; on behalf of themselves and all others similarly situated, Plaintiffs,

UNITED STATES OF AMERICA, Plaintiff-Intervenor,

WILLIAM STEWART, as Commissioner of Louisiana Health and Human Resources Administration; SIDNEY GOMEZ, individually, and as Director of Child Placement, Division of Mental Retardation, Louisiana Health and Human Resources Administration; ISRAEL SIDNEY, as Director of Orleans Parish Juvenile Probation Department; THE BROWN SCHOOLS, INC.; JONES CHILDREN'S HAVEN, INC.; DILLEN'S CHILDREN'S HOME, INC.; CHILDREN'S COTTAGE, INC.; EAST TEXAS GUIDANCE AND ACHIEVEMENT CENTER, INC.; MISSION ROAD FOUNDATION FOR EXCEPTIONAL CHILDREN, INC.; MARY LEE FOUNDATION; MARBRIDGE FOUNDATION FOR RETARDED CHILDREN, INC.; SHADY BROOK SCHOOL CORP., INC.; BEAUMONT REMEDIAL CLINIC, INC.; MERIDELL ACHIEVEMENT CENTER, INC.; SUMMIT OAKS ACHIEVEMENT CENTER, INC.; ABILENE YOUTH CENTER, INC.; BAGLEY HOME FOR EXCEPTIONAL CHILDREN, INC.; GREENHIGH RESIDENTIAL TREATMENT CENTER, INC.; HEART OF TEXAS CONVALESCENT HOME, INC.; THE HUGHEN CENTER, INC.; McDONALD DEVELOPMENTAL HOME, INC.; PEACEFUL VALLEY CHILDREN'S HOME, INC.; GERTRUDE THOMAS HOME FOR EXCEPTIONAL CHILDREN, INC.; ROLLING CREEK MANOR, INC.; FRED DAY HOME FOR CHILDREN, INC.; WOOD ACRES CHILDREN'S HOME, INC.; DYER VOCATIONAL TRAINING CENTER; ADA WILSON HOSPITAL OF PHYSICAL MEDICINE AND REHABILITATION, INC.; ANGIE NALL SCHOOL-HOSPITAL FOR EDUCATIONAL RETRAINING, INC.; BARTLEY WOODS HOUSE, INC.; CENTURY EVALUATION AND TRAINING CENTER, INC.; COMMUNITY LIVING CENTER.; DALLAS ACADEMY INC.; DARDEN HILL RANCH SCHOOL, INC.; HOME OF THE HOLY INFANCY, INC.; NEW HORIZONS RANCH, INC.; PARKER FOUNDATION, INC.; RANGER PARK HOSPITAL AND RANGER PARK INN, INC.; SUNSET ACRE HOME; TEXAS CHILDREN'S HOME; CHARLES VAN SCOY, owner, operator of and/or doing business as BALCONES CHILDREN'S PSYCHIATRIC HOSPITAL; SEALY SMITH, owner, operator of and/or doing business as AMERICAN TRAINING CENTER; L. C. BAXTER, owner, operator of and/or doing business as LULLABYE CHILDREN'S HOME, Defendants.

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No. 80-875

IN THE

Supreme Court

OF THE

United States

OCTOBER TERM, 1980

STATE OF LOUISIANA, et al.,
Petitioners,

VS.

GARY W., et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Louisiana on the merits of this case is reported at 437 F.Supp. 1209. The opinion of the district court holding that respondents are entitled to attorneys' fees under 42 U.S.C. § 1988 in the amount stipulated to by the parties is reported at 429 F.Supp. 711. The opinion of the district court holding that its judgment requiring the payment of court costs and attorneys' fees is enforceable under either Rule 69 or Rule 70 of the Federal Rules of Civil Procedure is reported at 441 F.Supp. 1121. The opinion of the United States Court of Appeals for the

Fifth Circuit affirming the district court's decision regarding the enforceability of the court costs and attorneys' fees judgment is reported at 622 F.2d 804.

STATEMENT OF THE CASE

This case was filed by respondents on September 3, 1974 as a class action under 42 U.S.C. § 1983. Respondents challenged on federal constitutional and statutory grounds the placement by the Louisiana Department of Health and Human Resources (hereafter "the Department") of hundreds of handicapped and neglected Louisiana children in unfit custodial institutions in Texas, far from the children's homes.[3] Following extensive discovery, a lengthy trial was held before Judge Alvin B. Rubin, in March, 1976. On July 26, 1976, the district court ruled that the Department had

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[3]The caption in this case incorrectly refers to the State of Louisiana as a petitioner. The State is not a party to his case. (To avoid the possibility of confusion, respondents have, in the caption to this brief, followed petitioners' form and listed the State of Louisiana as a petitioner.)

Initially, the suit did name as defendants the State of Louisiana, the Department of Health and Human Resources (which was formerly the Louisiana Health, Social, and Rehabilitation Services Administration and then became the Louisiana Health and Human Resources Administration), and a number of state officials, including the Governor. However, on December 13, 1974, approximately three months after the litigation was commenced, the court granted respondents leave to file a second amended complaint, which, *inter alia*, dropped as defendants the State of Louisiana, the Department, and many of the State officials originally named, including the Governor. It left as the principal state agency defendant the Secretary of the Department in his official capacity. All of the relief for which review is herein being sought was directed against the Secretary of the Department in his official capacity. For this reason, petitioners are hereafter referred to in this brief as "the Department."

violated the children's rights under the Fourteenth Amendment to the United States Constitution and section 408(f) of the Social Security Act, 42 U.S.C. § 608(f)(1). (437 F. Supp. 1209 (E.D. La. 1976)). The court found, *inter alia,* that "in many instances, Louisiana children have been placed in Texas institutions inappropriate to the needs of the particular child involved. In many other instances, children in some Texas institutions have been physically mistreated." (437 F.Supp. at 1220-21).[4] Hearings were subsequently held concerning relief,[5] and on December 2, 1976, the court issued a comprehensive order setting forth relief in the case, requiring, *inter alia,* that individualized treatment plans be developed for the children based on professional evaluations and that the children then be placed in accordance with those plans. An amendment to the December 2, 1976 order was subsequently entered on January 31, 1977. This comprehensive order, as amended, is reported in its entirety at 437 F.Supp. at 1225-1231. It was not appealed by the Department nor by any other defendant.[6]

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[4]Mistreatment in certain of the institutions included serious health and fire hazards, unsafe medical practices, handcuffing, chaining and beating of children, and excessive drugging of children. (Appendix A to Opinion of July 26, 1976).

[5]Interim decrees and orders granting partial relief, some of which required the prompt removal of the children from the institutions referred to in n.4, *supra,* had previously been entered. Orders of June 23, 1976; July 26, 1976; September 10, 1976; and September 22, 1976.

[6]The Petition is doubly incorrect in its assertion that the court "ordered the return of the Louisiana children from Texas to Louisiana at an untold cost to the state. . . ." (Pet., p. 2). First, the court's decision in no way prohibited the respondent from providing adequate treatment in Texas or, for that matter, in any other state. (437 F.Supp. at 1219, 1227). And second, with regard to fund-

Following the court's decision on the merits, respondents applied for the assessment of reasonable attorneys' fees against the Department. The Department contested respondents' entitlement to fees, but stipulated with respondents as to the amount of such fees. (The Statement of Understanding and Joint Stipulation is reprinted at p. A7, *infra.*) On February 3, 1977, following extensive briefing and oral argument, the district court held that respondents were entitled to attorneys' fees under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, in the amount stipulated to by the parties (429 F.Supp. 711 (E.D. La. 1977)) (Pet., p. A1).

Accordingly, the district court entered a judgment on March 15, 1977, incorporating the previous comprehensive order on the merits, and ordering the Department to pay respondents' court costs and attorneys' fees in the amount stipulated. (The Judgment is reprinted at p. A3, *infra.*)

The Department did not appeal from the judgment, and respondents requested that it be satisfied. After twice attempting and failing to obtain enabling legislation pursuant to Article 12, Section 10(C) of the Louisiana Con-

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ing, the court simply required that, if necessary to implement their treatment plans, the respondent children should receive treatment at the *same* per capita funding level then being expended for them in Texas institutions. (437 F.Supp. at 1227). Indeed, the problem necessitating judicial intervention pertained not to lack of funding, but to the absence of treatment, or, in certain instances, seriously abusive treatment in the Texas institutions. (437 F.Supp. at 1220-21). For, as the court observed, the Department, "in some sort of anti-parochialism," was paying the unmonitored Texas institutions far more than it was paying facilities providing treatment in Louisiana. (437 F.Supp. at 1221).

stitution, the Department refused compliance on the ground that the Louisiana Legislature had voted to defy the judgment.[7]

In order to obtain enforcement of the judgment, respondents, on September 2, 1977, in conformity with Rule 69 of the Federal Rules of Civil Procedure and Louisiana practice, caused a writ of *fieri facias* to be issued directing the United States Marshal for the Eastern District of Louisiana to seize funds of the Department deposited in the American Bank and Trust of Baton Rouge in an amount sufficient to satisfy the judgment. Respondents

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[7]The Petition does not make clear the sequence of the Legislature's rejection of two bills that would have specifically authorized the Department to pay respondents' court costs and attorneys' fees. (Pet., p. A79-A84). House Bill No. 1621, an appropriations bill to satisfy the judgment, was referred to the Committee on Appropriations on May 18, 1977. It was then defeated in Committee and thus failed to reach the House floor. Subsequent to the defeat of this bill, the Legislature ended its regular session. Thereafter, the Legislature was recalled by the Governor for a special session, and legislation authorizing compliance with the judgment in this case was made a part of the legislative call. A new bill appropriating funds specifically to satisfy the judgment, House Bill No. 15, was thereupon introduced, and this time the Committee on Appropriations reported it to the House floor. However, after extensive debate, the bill was defeated in the Louisiana House on August 11, 1977. There is absolutely no record evidence to support petitioners' contention that the bill was defeated because of legislative discontent with the amount that had been stipulated to by the Department. (Pet., p. 3). Indeed, the statement in the Petition that the Legislature unfavorably compared the present award with the award rendered in a wholly unrelated case, *Williams v. McKeithen*, No. 71-98 (M.D. La. 1980) (Pet., p. 3, n.4), cannot possibly be accurate, since the Petition itself indicates that the award in *Williams* was not made until August 14, 1980, some three years after the legislative debate. In any event, the record is clear that the stipulated award in the

thereafter filed both a petition under Rule 69 to make the bank a garnishee, and a motion, in the alternative, for an order of specific performance under Rule 70 of the Federal Rules of Civil Procedure requiring the Secretary, in his official capacity, to pay respondents' court costs and attorneys' fees from departmental funds under pain of contempt, notwithstanding contrary provisions of state law. The Department opposed Respondents' Rule 69 petition and Rule 70 motion, and moved to quash the writ of *fieri facias*.[8]

These matters were heard by the district court on September 21, 1977, and on October 24, 1977, Judge Rubin, then sitting as a district judge by designation, handed down a thorough opinion holding that respondents were entitled to enforcement of the judgment by way of *either* a Rule 69 writ of execution or a Rule 70 specific performance order.

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present case was eminently reasonable. As Judge Rubin pointed out:

> "The case reached trial after two years of intensive preparation. Over 47,000 pages of exhibits were introduced or referred to: over 3,300 pages of testimonial depositions were introduced; and the trial occupied eleven days. The testimony of eighteen expert witnesses and sixteen fact witnessses was taken. Eighteen lawyers participated in the trial. [It should be noted that only three of these lawyers appeared for respondents.] Voluminous briefs have been filed, before and after the trial." 437 F. Supp. at 1213.

In the intervening three years since the Legislature took its stand in defiance of the district court's order, it has failed to enact legislation appropriating funds to satisfy the still outstanding judgment.

[8]The Department also moved for rescission of the judgment under Rule 60(b) of the Federal Rules of Civil Procedure on the ground that the court's entitlement decision was based on "mistake, inadvertence, or excusable neglect."

(441 F.Supp. 1121 (E.D. La. 1977))(Pet., p. A8). Since respondents expressed "no preference" as between Rule 69 and Rule 70 modes of enforcement, and the Department "stated that, if relief is to be granted, they would prefer an order issue pursuant to Rule 70" (441 F.Supp. at 1127) (Pet., p. A18), the court issued a Rule 70 enforcement order. The Order, which is reprinted at p. A1, *infra,* directed the Secretary, in his official capacity, to pay respondents' court costs and attorneys' fees from departmental funds under pain of contempt, notwithstanding contrary provisions of the Louisiana Constitution.[9]

On October 28, 1977, the Department filed an appeal from the court's enforcement order and was granted a stay pending appeal on the condition that it place $225,000 in escrow in lieu of a supersedeas bond. (Pet., p. A20).[10] On July 31, 1980, the Fifth Circuit issued a unanimous decision

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[9]The court's order included an award of attorney's fees for the professional work performed by plaintiffs' attorneys to obtain enforcement of the judgment (p. A2, *infra*), the amount of such fees again having previously been stipulated to by the parties. (441 F.Supp. at 1127-28) (Pet., p. A18-A19). The court also issued a separate order on the same date denying the Department's Rule 60(b) motion to rescind the attorneys' fees judgment. (441 F.Supp. at 1123-24) (Pet., p. A9-A11).

[10]Petitioners are incorrect in asserting that the district court "seized" state funds. (Pet., pp. i, 7, 9, 12). The court simply issued an order requiring the Secretary in his official capacity to comply with the terms of the judgment. (*See* p. A1 *infra.*) The Order itself makes clear that the remedy for noncompliance, as in the case of any other injunction, is contempt, not seizure. (*Id.* at A2). The funds were placed by the Department in an escrow account, not pursuant to a seizure, but as a condition of a stay pending appeal, in lieu of a bond. (Pet., p. A20). The Department has had the full use of the interest pending the completion of the appellate process. (Pet., p. A21).

(Judges Goldberg, F. Johnson, and Hatchett) affirming the district court's enforcement order. (622 F.2d 804)(Pet., p. A23). The court made extensive reference in its decision to its unanimous decision a few months earlier in *Gates v. Collier,* 616 F.2d 1268 (May 17, 1980) (Judges Hill, Brown, and Randall) (Pet., p. A29), in which both petitioners and respondents in this case had filed amicus briefs.

ARGUMENT

A. In urging certiorari, petitioners do not claim a conflict in the circuits.[11] Nor do they seriously argue that the

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[11]While petitioners do not urge a circuit conflict, they nonetheless seem to suggest that *New York State Association for Retarded Children v. Carey,* 631 F.2d 162 (2d Cir. 1980) (Pet., p. A62), and *Hamilton v. MacDonald,* 503 F.2d 1138 (9th Cir. 1975), are somehow pertinent to this Court's decision on certiorari. (Pet., pp. 10-11). Their failure to assert a conflict is understandable, however, for there is nothing in the decisions of the Second and Ninth Circuits in those cases that in any way conflicts with the Fifth Circuit's decision here.

Carey involved an attempt to cite a governor for contempt for allegedly violating the terms of a consent decree by failing to obtain legislative funding for a Review Panel to oversee claimed unconstitutional conditions at a state institution. But in denying contempt, both the majority and concurring opinions pointed out that the governor had fully complied with the Decree, since, in terms, it only required him "to act within his 'lawful authority, including the State Constitution and applicable State laws and subject to any legislative approval that may be required.'" 631 F.2d at 166. While the majority opinion in *Carey* did state that, in fashioning relief, a court should attempt to utilize alternatives that do not require the "enforce[ment of] a direct order . . . to raise and allocate large sums of money" (631 F.2d at 165) (ellipsis in original), it did so in a context in which such alternatives were available ("order[ing] the state either to take the steps necessary to rectify the violations or to close the institution," *id.*). As both the district court and the court of appeals found in the present

judgment below contravenes any decisions of this Court.[12] Rather, their argument for review is based on the contention that the case involves an important and unsettled question of federal law. However, while the question of

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case, however, in a circumstance such as this where money (in the form of attorneys' fees and court costs) is the nub of the dispute, the only way to enforce a valid judgment against a recalcitrant state agency is by a Rule 70 order requiring specific performance or a Rule 69 writ of execution. (441 F.Supp. at 1127) (Pet., p. A18); (622 F.2d at 806-07) (Pet., pp. A25, A27); *see also Gates v. Collier*, 616 F.2d 1268, 1270-72 (5th Cir. 1980) (Pet., pp. A31-A34). That the court in *Carey* did not hold that a state official could never be subject to contempt for failing to comply with a judgment requiring the payment of money was made clear in the Order on Petition for Rehearing, which left open the possibility of contempt upon remand. 631 F.2d at 169. (This Order was inexplicably omitted from the reprint of the decision in the Petition.)

Hamilton v. MacDonald, supra, is entirely inapposite. The case did not involve the enforcement of a money judgment but, rather, of an order requiring the transfer of land. 503 F.2d at 1148. Consequently, the only question decided was whether the provision of Rule 69 applying state procedure to a writ of execution (unless the case is governed by an applicable federal statute) applied to an order of specific performance under Rule 70, and the court held that it did not. *Id.* While the court did discuss in general terms the applicability of Rule 69 to money judgments, it did not focus, presumably because the issue was not before it, on that part of Rule 69 which allows for the enforcement of such judgments by a means other than a writ of execution. *See* pp. 15-16, *infra.*

[12]Petitioners' reliance on *South Dakota v. North Carolina*, 192 U.S. 286 (1904), for the proposition that "sometimes judgments simply are not enforceable" is entirely misplaced. (Pet., p. 12). The judgment against the state in that case *was* enforced by this Court through the creative use of its equity power to foreclose upon state property. 192 U.S. at 321. Moreover, as the Court remarked 14 years later in *Virginia v. West Virginia*, 276 U.S. 565, 592 (1918), the "doubt [that] had been expressed by individual judges" as to the enforceability of a money judgment against a state was not passed on by the Court in that earlier case since "that question was not involved in the case . . . and that subject was hence left open to be passed on in the future when the occasion required."

whether a federal court has the authority to enforce against a recalcitrant state agency a valid judgment for the payment of money may be important, it has been settled for at least 62 years.

In *Virginia v. West Virginia*, 276 U.S. 565 (1918), this Court made plain that a federal court has full authority to compel a state to pay a valid judgment. As Chief Justice White stated for a unanimous Court:

> "That judicial power essentially involves the right to enforce the results of its exertion is elementary. *Wayman v. Southard*, 10 Wheat. 1, 23; *Bank of the United States v. Halstead*, 10 Wheat. 57; *Gordon v. United States*, 117 U.S. 697, 702." 246 U.S. at 591.

Petitioner urges that the principle set forth in *Virginia v. West Virginia* applies only to controversies between states and is, thus, inapplicable to the present case which involves a dispute between individuals and a state agency. (Pet., p. 8). But the only reason the federal courts might ordinarily be impotent in the latter situation is the Eleventh Amendment, which, in most instances, bars retroactive monetary awards against state agencies. *Edelman v. Jordan*, 415 U.S. 651 (1974). For, as *Virginia v. West Virginia* specifically points out, except in cases coming under the Eleventh Amendment, "[t]he State . . . as a governmental entity [has] been subjected by the Constitution to the judicial power . . . and the duty to enforce the judgment . . . [is] certain, even although th[is] exertion may operate upon the governmental powers of the State. . . ." 246 U.S. at 600. It is precisely this "[judicial] power which, following its recognition in *Chisholm v. Georgia*, 2 Dall. 419, was

withdrawn [in part] by the adoption of the Eleventh Amendment." *Id.* Thus, for a case not within the reach of the Eleventh Amendment, *Virginia v. West Virginia* is controlling upon the federal court's power to enforce its judgment against a state agency.

The judgment whose enforceability is at issue in the present case concerns court costs and an award of attorneys' fees under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988. Court costs, of course, have been recognized as outside the scope of the Eleventh Amendment at least since *Fairmont Creamery Co. v. Minnesota*, 275 U.S. 70 (1927), if not much earlier. *See* collected cases in *North Dakota v. Minnesota*, 263 U.S. 583 (1924). And in *Hutto v. Finney*, 437 U.S. 678, 693-700 (1978), this Court made plain that attorneys' fees under the 1976 Act were likewise beyond the Eleventh Amendment's reach. Thus, under the doctrine of *Virginia v. West Virginia*, the district court had both the "power . . . and the duty to enforce the judgment by resort to appropriate remedies" (246 U.S. at 600) against petitioners who, while conceding the judgment's validity, were otherwise unwilling to comply with it. (441 F.Supp. at 1127) (Pet., p. A18).[13]

B. While *Hutto v. Finney*, 437 U.S. 678 (1978), did not directly address the enforcement question, the decision is premised on the enforceability of a judgment awarding court costs and attorney's fees against a state agency.

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[13] *See also Griffin v. Prince Edward County*, 377 U.S. 218, 233 (1964), in which this Court held that, if necessary to enforce federal rights, the federal courts have the power to order the levy of a tax and the expenditure of revenues.

First, if petitioners are correct that a state agency has the raw power to escape liability for a valid federal court monetary judgment, there would have been little point to the Court's vigorous debate over the reach of the Eleventh Amendment in *Hutto* or, for that matter, in the numerous cases on the subject since *Hans v. Louisiana,* 134 U.S. 1 (1890). *See, e.g., Edelman v. Jordan,* 415 U.S. 651 (1974); *Employees of Department of Public Health & Welfare v. Missouri,* 411 U.S. 279 (1973); *Parden v. Terminal Railway,* 377 U.S. 184 (1964). For under the petitioners' interpretation, the Eleventh Amendment would, for all practical purposes, be entirely superfluous; if states could avoid federal court intervention in their fiscal affairs simply by refusing to pay any judgment ordered, it would matter little whether they are subject to the court's jurisdiction.

Second, in *Hutto,* the Court was not confronted simply with the propriety of a fee award in the abstract but, rather, with an outstanding district court "order requiring that the fees be paid from public funds." 437 U.S. at 690. *See also Finney v. Hutto,* 548 F.2d 740, 742 (8th Cir. 1977) ("order requiring the [fee] award to be paid directly from the funds of a state agency"). And the Court made it clear that relief of this sort was precisely what Congress intended in enacting the 1976 Act:

> "[I]t is intended that the attorneys' fees, like other items of costs, will be collected either directly from the official, in his official capacity, from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party). S. Rep. No. 94-1011, p. 5 (1976)."

437 U.S. at 694; *see also* H.R. Rep. No. 94-1558, p. 7 (1976).[14]

Third, in a portion of the *Hutto* opinion joined by the Chief Justice and Justice Powell, the Court emphasized the importance of sanctions requiring the payment of money to the control of litigation by the federal courts, including cases involving state agencies, and stated in language reminiscent of that used in *Virginia v. West Virginia, supra:*

> "[F]ederal courts are not reduced to issuing injunctions against state officers and hoping for compliance. Once issued, an injunction may be enforced. Many of the court's most effective enforcement weapons involve financial penalties. . . . If a state agency refuses to adhere to a court order, a financial penalty may be the most effective means of insuring compliance." 437 U.S. at 690-91; *see also id.* at 695, n.24.

The ramifications of the Department's position that a judgment involving the payment of money, even when issued under the court's equity powers, cannot be enforced by a specific performance order under pain of contempt, but only by a writ of execution, and that a state can, at its option, exempt itself from such a writ entirely, would render the type of sanctions discussed in *Hutto,* as well as such relief as back pay awards under a variety of federal stat-

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[14]The Court also pointed out that the Congress twice rejected attempts to amend the Act in a fashion that would accomplish precisely the result petitioners seek here. 437 U.S. at 694, *see* 122 Cong. Rec. S16431-S16434 (Sept. 2, 1976) (amendment of Sen. Helms); 122 Cong. Rec. S16567 (Sept. 24, 1976) and S16656-57 (Sept. 27, 1976) (amendment of Sen. Allen).

utes (*e.g.*, 42 U.S.C. § 2000e, *see Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976)), entirely unenforceable.

C. As the opinions of both the district court and the court of appeals in this case (and in *Gates v. Collier, supra*, 616 F.2d at 1271 (Pet., pp. A32-A33), its Fifth Circuit predecessor) make clear, the Federal Rules of Civil Procedure provide the district court with the tools necessary to secure compliance with its judgment. (Pet., pp. A11-A18, A26-A27). Since respondents had no preference between the two possible modes of relief—a Rule 69 writ of execution and a Rule 70 specific performance order—and since petitioners "stated that, if relief is to be granted, they would prefer an order issue pursuant to Rule 70" (441 F.Supp. at 1127) (Pet., p. A-18), the district court enforced the judgment by way of an order requiring specific performance (*infra* at p. A1). A brief review of both rules leaves no doubt that the district court acted fully within its authority.

Rule 70. Petitioners' sole argument against the district court's order requiring specific performance is that a Rule 69 writ of execution is the exclusive means of enforcing a money judgment in federal court. (Pet., pp. 11-12). Petitioners state: "if Rule 69 were not to apply to the execution of *all* money judgments, there would have been an exception clearly provided within the terms of Rule 69." (Pet., p. 11) (emphasis in original). The obvious flaw in petitioners' argument, however, is that Rule 69 in terms *does* contain such an exception. Rule 69(a) states: "the process to enforce a judgment for the payment of money

shall be a writ of execution, *unless the court directs otherwise*" (emphasis added). Thus, the use by the district court of its equity power to enforce, against a state official in his official capacity, a judgment requiring the payment of court costs and attorneys' fees from agency funds was fully consistent with Rule 69. Indeed, since the origin of court costs and attorneys' fees is the "original authority of the chancellor to do equity" (*Sprague v. Ticonic National Bank,* 307 U.S. 161, 166 (1939)),[15] a Rule 70 order requiring specific performance is perhaps the most appropriate way to enforce such relief, particularly where, as here, the repository of the funds is a state agency, against which a writ of execution might be unnecessarily disruptive.

Rule 69. As the district court recognized, the judgment requiring the Department to pay respondents' court costs and attorneys' fees was also enforceable by a Rule 69 writ of execution. (441 F.Supp. at 1125-27) (Pet., pp. A14-A18). Rule 69(a) provides that the "procedure" in obtaining a writ shall be in accordance with state "practice and procedure," "except that any statute of the United States governs to the extent that it is applicable." Assuming, as petitioners contend, that the total exemption under Article XII, Section 10(C) of the Louisiana Constitution of *all* state property from attachment *is* a "practice" or "pro-

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[15]As early as 1882, this Court held that the federal courts can order the payment of attorneys' fees, "irrespective of any state legislation." *Dodge v. Tulleys,* 144 U.S. 451, 457 (1892). "[T]heir general powers as courts of equity are not determined and cannot be cut off by any state legislation." *Id.*

cedure,"[16] an applicable federal statute, the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, which makes attorneys' fees to the prevailing party "part of the costs," "governs" this case for purposes of Rule 69. For, as *Hutto v. Finney, supra,* 437 U.S. at 694, 700, made clear, Congress specifically intended fee awards under the Act to be collected directly from state agency funds.

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[16]This assumption is, in fact, extremely dubious. There is no case law supporting the view that the *total* exemption by the state of a particular party from any writ of execution is a rule of "practice" or "procedure" to be followed under Rule 69. In *Anderson v. Tucker,* 68 F.R.D. 461, 462 (D. Conn. 1975), the court pointed out that, in interpreting Rule 69, state rules "are to be applied in a common sense manner, of course." While many courts have held that state law governs as to the applicable exemptions, in all of these cases the exemption has been only of certain types of property of a party, not of all the property that a party might own, which is, of course, tantamount to an exemption of the party itself. *See, e.g., U.S. v. Miller,* 229 F.2d 839 (3d Cir. 1956); *First National Bank of Boston v. Santisteban,* 181 F.Supp. 366 (D.P.R. 1960), *aff'd,* 285 F.2d 855 (1st Cir. 1961); *U.S. v. Hackett,* 123 F.Supp. 106 (W.D. Mo. 1954). It would turn principles of federalism totally around if the states could declare certain individuals, or certain classes of individuals, completely beyond the reach of the enforcement power of the federal courts in every case in which a money judgment against them were rendered. For example, if a state legislature were to perceive some advantage to the state in exempting all policemen, or all teachers, or all persons in a certain location, from enforcement of money judgments against them by a writ of execution, we would not think the federal courts bound by that decision by virtue of Rule 69 in cases involving the violation of federal law. For, as this case exemplifies, at the point where an exemption becomes that of a party rather than that of certain property of a party, it becomes a matter of substance rather than a mere matter of practice or procedure; that is, it comes to govern not the manner in which the prevailing party shall have a remedy, but whether the party shall have a remedy at all.

D. As in *Virginia v. West Virginia, supra,* 246 U.S. at 604-06, where the Court gave the state a final opportunity to comply voluntarily with the judgment before bringing federal enforcement machinery to bear, the district court in the present case also first attempted to obtain voluntary compliance. The court recounted in its decision regarding respondents' enforcement motions (which were filed only after the Legislature had voted to defy the judgment):

> "State defendants were given the opportunity, even after these motions were heard, to suggest a manner in which they could satisfy the judgment. But they have not offered any kind of compliance with the judgment, direct or indirect, soon or after an interval. This court would not be fulfilling its duty if it failed to enforce the constitutional statutes of the Congress." (441 F.Supp. at 1127) (Pet., p. A18).

As the court of appeals stated upon reviewing the record below: "an order directing the responsible state official to satisfy the judgment out of state funds is the only reasonable way to ensure compliance with a valid federal judgment." (622 F.2d at 807) (Pet., p. A27).[17]

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[17]The only alternative method of enforcing the judgment ever offered by petitioners was presented to the court of appeals at oral argument:

> "At oral argument, appellants suggested that appellees might seek a contempt citation against the Louisiana legislature for failing to appropriate funds to satisfy the judgment. However, the Louisiana legislature is not a party to this action. Moreover, the chaos in the state appropriations process appellants predict if the court's order is affirmed would be dwarfed by the disruption that would be caused by a contempt citation against the state legislature, if such a sanction is possible." (622 F.2d at 806, n.4) (Pet., p. A25).

E. Petitioners urge that "this is a case of first impression" (Pet., pp. 8, 14). Insofar as the case involves the enforcement of a valid money judgment against a state agency that is outside the scope of the Eleventh Amendment, it is controlled by *Virginia v. West Virginia, supra.* (*See* pp. 10-11, *supra*). And while the Civil Rights Attorney's Fees Awards Act of 1976 may be relatively new, orders by the federal courts requiring state agencies to pay attorney's fees, under other federal statutes or for bad faith, as well as court costs, have been issued throughout the history of the Republic. The absence of any case law on the subject indicates that such judgments have routinely been satisfied. This circumstance would seem to eliminate any serious doubt as to their enforceability. As Chief Justice White stated in *Virginia v. West Virginia*:

> "Nor is there room for contending to the contrary because, in all the cases cited, the States against which judgments were rendered, conformably to their duty under the Constitution, voluntarily respected and gave effect to the same. This must be unless it can be said that, because a doctrine has been universally recognized as being beyond dispute and has hence hitherto, in every case from the foundation of the Government, been accepted and applied, it has by that fact alone now become a fit subject for dispute." 246 U.S. at 591-92.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

December, 1980.

Respectfully submitted,

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(Appendix Follows)

Appendix

United States District Court
Eastern District of Louisiana

Civil Action
No. 74-2412
Section "C"

Gary, W., et al

v.

William Cherry, et al

ORDER PURSUANT TO RULE 70 REQUIRING DEFENDANT CHERRY TO PAY PLAINTIFFS' ATTORNEYS' FEES FROM DEPARTMENTAL FUNDS NOTWITHSTANDING ARTICLE XII, SECTION 10(C) OF THE LOUISIANA CONSTITUTION

Good cause having been shown, it is hereby ORDERED, ADJUDGED and DECREED:

1. Defendant William Cherry in his official capacity as Secretary of the Louisiana Department of Health and Human Resources (hereafter DHHR) shall, within 10 days of this Order, notwithstanding Article XII, Section 10(C) of the Louisiana Constitution and all statutes enacted and regulations promulgated pursuant thereto, pay plaintiffs' attorneys from funds of DHHR the amount of attorneys' fees and costs specified from date of Judgment;

2. Defendant William Cherry in his official capacity as Secretary of DHHR shall, within 10 days of this Order, notwithstanding Article XII, Section 10(C) of the Louisiana Constitution and all statutes enacted and regulations promulgated pursuant thereto, pay plaintiffs' attorneys from funds of DHHR attorneys' fees and costs as follows:

a. To the Children's Defense Fund of the Washington Research Project $2,000.00 in attorneys' fees and $322.00 in expenses incurred through September 21, 1977, together with interest at the legal rate from the date of this Order;

b. To William Rittenberg $1,000.00 in attorneys' fees incurred through September 21, 1977, together with interest at the legal rate from the date of this Order.

3. For purposes of compliance with this Order, the application to defendant Cherry of Article XII, Section 10(C) of the Louisiana Constitution, and all statutes enacted and regulations promulgated pursuant thereto, shall hereby be enjoined;

4. Defendant Cherry shall thereafter be held in contempt of this Court if he fails to comply fully with the requirements of paragraphs 1 and 2 of this Order.

New Orleans, Louisiana, this 24th day of October 1977.

/s/ ALVIN B. RUBIN

United States District Judge

United States District Court
for the
Eastern District of Louisiana

Civil Action
No. 74-2412
Section "C"

Gary W., et al.,
Plaintiffs,

v.

William Stewart, et al.,
Defendants.

JUDGMENT AGAINST ALL DEFENDANTS EXCEPT DYER VOCATIONAL TRAINING CENTER AND EAST TEXAS GUIDANCE AND ACHIEVEMENT CENTER

This case having been tried on the claims of plaintiffs and plaintiff-intervenor against all defendants for injunctive relief, and the court having rendered its decision on those claims, and there being no claims remaining outstanding against any defendants except for plaintiffs' claims for damages against defendants Dyer Vocational Training Center and East Texas Guidance and Achievement Center, and there being no just reason for delay of the entry of a final Judgment against all defendants except Dyer Vocational Training Center and East Texas Guidance and Achievement Center;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that there be Judgment entered in favor of plaintiffs and the members of their class and plaintiff-intervenor against defendants William Stewart and Sidney Gomez, their successors in office, agents, employees and assigns (hereafter "Department of Health and Human Resources"); Abilene Youth Center, Inc.; Ada Wilson Hospital of Physical, Medicine and Rehabilitation, Inc.; American Training Center (Sealey Smith owner and operator); Angie Nall School—Hospital for Educational Retraining, Inc.; Balcones Children's Psychiatric Hospital (Charles Van Scoy owner and operator); Bartley Woods House, Inc.; Beaumont Remedial Clinic, Inc.; Century Evaluation and Training Center, Inc.; Darden Hill Ranch School, Inc.; Dillens Children's Home, Inc.; Gertrude Thomas Home for Exceptional Children, Inc.; Home of the Holy Infancy, Inc.; Hughen Center, Inc.; McDonald Development Home, Inc.; Mary Lee Foundation; Marbridge Foundation for Retarded Children, Inc.; Meridell Achievement Center, Inc.; Mission Road Foundation for Exceptional Children, Inc.; New Horizons Ranch, Inc.; Parker Foundation; Ranger Park Hospital and Inn; Shady Brook School, Inc.; and Summit Oaks Achievement Center, Inc. as follows:

1. The Department of Health and Human Resources is permanently enjoined from sending any children to Balcones Children's Psychiatric Hospital, Dyer Vocational Training Center, Inc., and Gertrude Thomas Home for Exceptional Children, Inc. All members of the plaintiffs' class now residing in these institutions shall be removed pursuant to the court's Order of September 22, 1976;

2. As set forth in the court's Order of September 10, 1976, Gertrude Thomas Home shall immediately feed all Louisiana children in a position which has the head and trunk elevated to at least a 45° angle with the head aligned in the midline position, i.e., not allowed to drop back or to either side, to prevent aspiration. A physical therapy consultant must be called in by Gertrude Thomas Home to teach and initially aid direct care staff in achieving the proper safe feeding position;

3. The Department of Health and Human Resources; Abilene Youth Center, Inc.; Ada Wilson Hospital of Physical, Medicine and Rehabilitation, Inc.; American Training Center (Sealey Smith owner and operator); Angie Nall School-Hospital for Educational Retraining, Inc.; Balcones Children's Psychiatric Hospital (Charles Van Scoy owner and operator); Bartley Woods House, Inc.; Beaumont Remedial Clinic, Inc.; Century Evaluation and Training Center, Inc.; Darden Hill Ranch School, Inc.; Dillens Children's Home, Inc.; Gertrude Thomas Home for Exceptional Children, Inc.; Home of the Holy Infancy, Inc.; Hughen Center, Inc.; McDonald Development Home, Inc.; Mary Lee Foundation; Marbridge Foundation for Retarded Children, Inc.; Meridell Achievement Center, Inc.; Mission Road Foundation for Exceptional Children, Inc.; New Horizons Ranch, Inc.; Parker Foundation; Ranger Park Hospital and Inn; Shady Brook School, Inc.; and Summit Oaks Achievement Center, Inc. shall implement fully and with dispatch each and every provision of the court's Order of December 2, 1976 ("Order With Respect To Children In Texas Institutions"), as amended in the court's Minute Entry of January 24, 1977;

4. The Department of Health and Human Resources shall pay the Children's Defense Fund of the Washington Research Project $174,519.88 for attorneys' fees and litigation expenses incurred through December 22, 1976, together with interest at the legal rate from date of Judgment.

5. The Department of Health and Human Resources shall pay William Rittenberg $30,397 for attorneys' fees incurred through December 22, 1976, together with interest at the legal rate from date of Judgment.

6. The Department of Health and Human Resources shall pay the court costs of plaintiffs and plaintiff-intervenor, as taxed by the clerk of the court.

7. The court shall retain jurisdiction of this cause.

/s/ ALVIN B. RUBIN

United States District Judge

New Orleans, Louisiana
March 15, 1977

United States District Court
for the
Eastern District of Louisiana

Civil Action
No. 74-2412
Section "C"

Gary W., et al.,
Plaintiffs,

v.

William Stewart, et al.,
Defendants.

STATEMENT OF UNDERSTANDING AND JOINT STIPULATION

It is the mutual understanding between counsel for plaintiffs and counsel for state-defendants, William Stewart and Sidney Gomez, that plaintiffs are seeking to be awarded attorneys' fees in this case pursuant to the Civil Rights Attorneys' Fees Awards Act of 1976 (Public Law 94-559) and, alternatively, under the "bad faith doctrine".

With respect to the "bad faith doctrine", plaintiffs are not seeking attorneys' fees against defendants Stewart and Gomez in their individual capacities and, thus, are not claiming that these defendants have individually acted in bad faith. Plaintiffs' claim under the "bad faith doctrine" is that DHHR (formerly LHHRA) has acted in bad faith. This claim is based on the facts in evidence set forth in

Plaintiffs' Memorandum Regarding the Court's Proposed Order and Attorneys' Fees (August 11, 1976), pp. 10-20, and Plaintiffs' Reply Memorandum In Response to Defendants' Memoranda Concerning Attorneys' Fees and the Court's Proposed Order (September 15, 1976). State defendants claim that the facts in evidence set forth in State Defendants' Memorandum In Opposition to Awarding Attorneys' Fees and Court Costs, pp. 18-22, refute the allegations of the bad faith of the agency.

Following a complete review and analysis of the documentation submitted to counsel for state defendants by counsel for plaintiffs, plaintiffs and state defendants jointly agree and stipulate that, should the court determine that plaintiffs are entitled to an award of attorneys' fees, then, considering all of the circumstances, the following hours, rates, expenses, and total compensation are agreed and stipulated to as reasonable:

For CDF attorneys:

Stephen P. Berzon, Attorney, 1,666 hours at $60 per hour equals $99,960.00

Daniel Yohalem, Attorney, 1,100 hours at $40 per hour equals $44,000

Janet Shur, Attorney, 500 hours at $30 per hour equals $15,000

Out of Pocket Litigation Expenses equal $15,559.88

For William Rittenberg:

CY-1974, 153.3 hours at $40 per hour equals $6,132.00

CY-1975, 208 hours at $45 per hour equals $9,360.00

CY-1975, 298.1 hours at $50 per hour equals $14,905.00

TOTAL 659.4 hours; $30,397.00

Agreed and Stipulated to:

By: /s/
STEPHEN P. BERZON
Attorney for Plaintiffs
This 22nd Day of
December 1976

By: /s/
CARMACK M.
BLACKMON
Attorney For State
Defendants This 27th Day
of December 1976

By: /s/
WILLIAM E.
RITTENBERG
Attorney for Plaintiffs
This 27th Day of
December 1976